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# REPORT OF CASES

DECIDED IN THE

## COURT OF QUEEN'S BENCH,

BY

CHRISTOPHER ROBINSON Q. C.,  
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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VOL. XXVIII.

CONTAINING THE CASES DETERMINED  
FROM MICHAELMAS TERM, 32 VICTORIA, TO EASTER TERM, 32 VICTORIA ;  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND DIGEST OF THE PRINCIPAL MATTERS.

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J U D G E S

OF THE

COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

---

THE HONORABLE WILLIAM BUELL RICHARDS, C. J.  
“ “ JOSEPH CURRAN MORRISON, J.  
“ “ ADAM WILSON, J.

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*Attorney-General :*  
THE HONORABLE JOHN SANDFIELD MACDONALD.



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REPORT OF CASES  
IN THE  
COURT OF QUEEN'S BENCH.

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MICHAELMAS TERM, 32 VICTORIA, 1868 (*Continued*).

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*Present :*

THE HON. WILLIAM BUELL RICHARDS, *C.J.*  
“ “ JOSEPH CURRAN MORRISON, *J.*  
“ “ ADAM WILSON, *J.*

PATRICK JAMES WHELAN, PLAINTIFF IN ERROR v. THE  
QUEEN, DEFENDANT IN ERROR.

*Record of conviction for felony—Caption—Commission—Jury process—  
Challenges.*

The record of a conviction for murder set out, in the caption, that the indictment was found at a General Session of Oyer and Terminer, and General Gaol Delivery, before the Chief Justice of the Common Pleas, duly assigned, and under and by virtue of the Statute in that behalf duly authorized and empowered, to enquire, &c., setting out the authority to hear and determine as formerly given in commissions, but not to deliver the gaol. It was then stated, that at the said Session of Oyer and Terminer, and General Gaol Delivery, the prisoner appeared and pleaded, and the award of venire was "therefore let a jury thereupon immediately come," &c. This record was returned to a writ of error directed "To our Justices of Oyer and Terminer for our County of C., assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies," &c. On error brought—

*Held*, that the authority of the Justice sufficiently appeared, without any statement whether a commission had issued or been dispensed with by order of the Governor; for such Courts are now held, not under commission, but by virtue of the Statute, Consol. Stat. U. C., ch. 11, as amended by 29-30 Vic. ch. 40; and as the record sufficiently shewed the absence of any commission, it must be presumed that it seemed best to the Governor not to issue one.

*Semble*, that if the Court had been held by a Queen's Counsel or County Court Judge, it might have been necessary to shew whether a commission had issued or not, as he would derive his authority from a different source in each of the two cases.

*Semble*, also, that if the caption had been defective, it might have been rejected altogether, under Consol. Stat. C. ch. 99, sec. 52.

It was objected that the only authority shewn being that of Oyer and Terminer, the award "therefore let a jury thereupon immediately come," was unauthorised, and a special award of *venire facias* was requisite; but, *Held*—assuming, but not admitting, that in England there is a difference in this respect between the power of justices of Oyer and Terminer and of Gaol Delivery, and that the record shewed no authority to deliver the gaol—that in this country, by the Jury Act, Consol. Stat. U. C., ch. 31, both have the same powers, the general precept to summon a jury being issued by both before the assizes.

The prisoner desired to challenge one S., one of the jurors called, for favor, alleging sufficient cause. The Judge ruled that he must first exhaust his peremptory challenges, and this point was raised by plea and demurrer, and formally decided. The entry on the record then was, that in deference to the judgment the challenge was taken and treated by the prisoner, and by the Attorney-General, as a peremptory challenge for and on behalf of the prisoner. Afterwards, having exhausted his twenty challenges, including S., he claimed to challenge peremptorily one H., contending that by the erroneous ruling he had been compelled to challenge S. peremptorily, and should not be obliged to count him as one of the twenty. This was also entered of record and decided against him.

*Held.* 1. That the prisoner was entitled to challenge for cause before exhausting his peremptory challenges : that error would lie for the refusal of this right ; and that had S. been sworn there must have been *a venire de novo*—but, 2. *Morrison, J.*, dissenting, That by the peremptory challenge of S., which excluded him from the jury, the first ground of error was removed ; and that error on the second challenge could not be supported, for the prisoner had in fact had twenty peremptory challenges, and the peremptory challenge of S. being in deference to the ruling of the judge did not make it the less a peremptory challenge.

THE plaintiff in error was indicted for murder, and convicted at the Autumn Assizes for the County of Carleton, in September, 1868, and judgment of death was passed upon him, to be executed on the 10th of December following. A writ of error, returnable in this Court, was afterwards obtained, upon the fiat of The Honorable John Sandfield Macdonald, Attorney General ; to which a return was made.

On the second Monday of Michaelmas Term, 23rd November, 1868, under a writ of *Habeas Corpus* directed to the Sheriff of the County of Carleton (a), the plaintiff in error was brought into Court in custody of the said Sheriff ; and by his counsel, J. H. Cameron, Q.C., prayedoyer of the writ of error and the return thereto, which were read, as follows :

#### WRIT OF ERROR.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To our Justices of Oyer and Terminer for our County of Carleton assigned to deliver the Gaol of the said County of the prisoners therein being, and also to hear and determine all felonies, trespasses, and other evil doings within the same County, greeting :

Because in the record and proceedings, and also in the giving of judgment, on a certain indictment found against Patrick James Whelan, at a Court of Oyer and Terminer

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(a) The *Habeas Corpus* and return thereto were as follows :—

“Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith :

in and for the said County, held at Ottawa, in the said County, on the second day of September, in the thirty-second year of our reign, before The Honorable William Buell Richards, Chief Justice of our Court of Common Pleas, for a certain felony and murder of Thomas D'Arcy McGee, whereof he was indicted, and thereupon by a

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"To the Sheriff of the County of Carleton, and also the Keeper of our Gaol at Ottawa, in and for our said County of Carleton, greeting :

"We command you that you have before our Court of Queen's Bench, at Toronto, immediately after the receipt of this our writ, the body of Patrick James Whelan, detained in our prison under your custody, to undergo and receive all and singular such things as our said Court of Queen's Bench shall then and there consider of concerning him in that behalf, and have you then there this writ.

"Witness the Honourable William Buell Richards, Chief Justice of our Court of Queen's Bench at Toronto, the eighteenth day of November, in the thirty-second year of our reign.

"ROBERT G. DALTON,  
*C. C. & P.*

"By Rule of Court.

"RETURN.

"I, William Frederick Powell, Sheriff of the County of Carleton, to whom the writ hereunto annexed has been directed, do hereby humbly certify and return to our Sovereign Lady the Queen, that in obedience to the said writ I have present the body of Patrick James Whelan therein named, as by the said writ I am commanded. And I do further humbly certify and return, that before the coming to me of the said writ, that is to say, on the second day of September, one thousand eight hundred and sixty-eight, the said Patrick James Whelan was committed to my custody by virtue of a certain warrant or order of Court, the tenor of which is as follows :—

"COUNTY OF CARLETON :

"At the General Sessions of the Delivery of the Gaol of Carleton, holden at the City of Ottawa, in and for the said County, on Wednesday, the second day of September, in the year of our Lord one thousand eight hundred and sixty-eight, before The Honorable William Buell Richards, one of the Justices of Our Lady the Queen of her Court of Common Pleas at Toronto, assigned to deliver the said gaol of the prisoners therein being, Patrick James Whelan, convicted of felony, is ordered to be hanged by the neck till he be dead, on the tenth day of December in the aforesaid year.

"By the Court.

"(Signed) J. FRASER,  
*"Clerk of Assize."*

"And these are the causes of the taking and detaining the said Patrick James Whelan, which, together with his body, I have ready, as by the said writ I am commanded.

"(Signed) WILLIAM F. POWELL,  
*"Sheriff, County of Carleton."*

jury of the said County convicted, as it is said, manifest error hath intervened, to the great damage of the said Patrick James Whelan, as by his complaint we are informed. We being willing that the error, if error there be, should in due manner be corrected, and full and speedy justice done to the said Patrick James Whelan in this behalf, do command you that, if judgment be thereupon given, then you send to us, distinctly and openly, under your seals, or the seal of one of you, the record and proceedings aforesaid, with all things concerning the same, with this writ, so that we may have them before our Court of Queen's Bench, at Toronto, on the first day of Michaelmas Term next, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to law ought to be done.

Witness the Honorable William Buell Richards, Chief Justice of our Court of Queen's Bench at Toronto, the sixteenth day of November, in the thirty-second year of our reign.

By the Honorable

JOHN SANDFIELD MACDONALD,

*Attorney General of Ontario.*

#### RETURN TO THE WRIT OF ERROR.

The record and proceedings whereof mention is within made appear in a certain schedule to this writ annexed.

Signed and sealed ) The answer of the Justice within  
in presence of { named.  
R. G. DALTON. } (Signed)

WM. B. RICHARDS, C.J. [L.S.]

#### JUDGMENT ROLL.

"County of Carleton, } Be it remembered that at a  
To wit: } General Session of Oyer and  
Terminer and General Gaol Delivery, holden at the City  
of Ottawa, in and for the said County of Carleton, on



Wednesday, the second day of September, in the year of our Lord one thousand eight hundred and sixty-eight, in the thirty-second year of the reign of Our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, before the Honorable William Buell Richards, Chief Justice of Her Majesty's Court of Common Pleas for the Province of Ontario, a Justice of our said Lady the Queen duly assigned, and under and by virtue of the Statute in that behalf duly authorized and empowered, to enquire by the oaths of good and lawful men of the said County of Carleton, by whom the truth of the matter may be better known and enquired into, and by other ways, methods, and means, whereby he could or might the better know, as well within liberties as without, more fully the truth of all treason, misprisions of treason, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the money of Great Britain and Ireland, and of all other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful assemblies, unlawful uttering of words, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champerties, deceits, and all other misdeeds, offences and injuries whatsoever, and also the accessories of the same, within the said County of Carleton, by whomsoever and howsoever had, done, perpetrated and committed, and by what person or persons, to what person or persons, and when, how, and in what manner, and of all other articles and circumstances whatsoever, any, every, or either of them concerning; and the treasons and other the premises according to the law and custom of England, and the laws of the said Province, for this time to hear and determine—by the oaths of [mentioning the names of the Grand Jurors sworn, 20 in number], good and lawful men of the County aforesaid, then and there impanelled,

sworn and charged to enquire for the said Lady the Queen and for the body of the said County, it is presented in manner and form as followeth, that is to say :—

County of Carleton, } The Jurors for our Lady the Queen  
*To Wit.* } upon their oath present, that Patrick

James Whelan, on the seventh day of April, in the year of our Lord one thousand eight hundred and sixty eight, at the City of Ottawa, in the County of Carleton, did feloniously, wilfully, and of his malice aforethought, kill and murder one Thomas D'Arcy McGee. Whereupon the Sheriff of the said County of Carleton is commanded that he omit not for any liberty within his bailiwick, but cause the said Patrick James Whelan to come and answer, &c. And thereupon, at the same session of Oyer and Terminer and General Gaol Delivery of our said Lady the Queen, holden at the said City of Ottawa, in the said County of Carleton, on the second day of September, in the year of our Lord one thousand eight hundred and sixty-eight, before the said Honourable William Buell Richards, last above named, here cometh the said Patrick James Whelan, under the custody of William Frederick Powell, Esquire, Sheriff of the County aforesaid (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed) being brought to the bar here in his proper person by the said Sheriff, by whom he is here also committed, and having heard the said indictment read, and being asked whether he is guilty or not guilty of the premises in the said indictment above charged upon him, he saith that he is not guilty thereof, and thereof he puts himself upon the country. And the Honourable John Sandfield Macdonald, the Attorney General of the said Province of Ontario, who prosecutes for our said Lady the Queen in this behalf, doth the like. Therefore let a jury thereupon immediately come before the said The Honourable William Buell Richards, last above named, of good and lawful men of the county aforesaid, qualified according to law, by whom the truth of the matter may be

better known, and who are not of kin to the said Patrick James Whelan, to recognize upon their oath whether the said Patrick James Whelan be guilty of the felony and murder in the indictment above specified or not guilty, because as well the said Attorney General for the Province of Ontario, who prosecutes for our said Lady the Queen in this behalf, as the said Patrick James Whelan, have put themselves upon that jury. And the said Sheriff for this purpose impanels and returns the persons following, and arranges them in a panel in the order following, that is to say," [setting out the names of all the Petit Jurors returned to the Precept, sixty in number].

"And the said" [setting out the names of the twelve jurors first called], "being severally and successively called come. And the said" [giving the names of six out of the twelve] "are severally and successively peremptorily challenged by the said Patrick James Whelan, and altogether excepted from the said jury. And the said" [giving the names of five out of the twelve first called] "upon the prayer of James O'Reilly, Esquire, one of Her Majesty's Counsel learned in the law, who prosecutes for our Lady the Queen in that behalf, are severally and successively ordered by the Court to stand aside. And the said" [the last of the twelve] "is elected, tried, and sworn to speak the truth of and concerning the premises in the said indictment against the said Patrick James Whelan specified."

[The record then set out the names of eleven more of the jurors called, of whom three were challenged peremptorily by the prisoner, three ordered to stand aside for the Crown, and five sworn. Then the names of six more jurors called, of whom three were peremptorily challenged by the prisoner, two ordered to stand aside for the Crown, and one sworn. Then the names of five more jurors called, namely, Charles Brunette, Patrick Manion, Jonathan Sparks, William Gamble and Patrick Baxter, of whom three—Brunette, Manion, and Baxter—were ordered, for the Crown, to stand aside; and the record then proceeded to state the challenge of Jonathan Sparks, as follows:—]



“ And now, at this day, comes as well our said Lady the Queen, by Her Attorney General of the Province of Ontario, and the said Patrick James Whelan, in his own proper person, and the jury also come, and thereupon the said Patrick James Whelan challenges Jonathan Sparks, one of the said jurors, because he says that the said Jonathan Sparks is not indifferent between our Sovereign Lady the Queen and him, the said Patrick James Whelan, in that the said Jonathan Sparks has stated and said that if he was on Whelan’s jury he would hang him.

“ And the Queen, by the Attorney General of Ontario, says, that the said Patrick James Whelan is not now entitled to challenge for favor the said juror Jonathan Sparks, in this, that the said Patrick James Whelan has not exhausted his twenty peremptory challenges, only twelve jurors being challenged by him peremptorily.

“ And the said Patrick James Whelan says, that the said answer of the said Attorney General, on behalf of our said Sovereign Lady the Queen, to the said challenge of the said Patrick James Whelan to the said juror Jonathan Sparks, is not sufficient in law.

“ And hereupon it is considered, and adjudged, and ordered, by the Court, that the said Patrick James Whelan is not now entitled to challenge for cause the said Jonathan Sparks; and the said judgment is delivered by the said learned Chief Justice in writing, as follows:—‘ I overrule the demurrer. I decide that the prisoner’s challenge is good as a peremptory challenge and not as a challenge for cause; and if his peremptory challenges of twenty, including this, are exhausted, I rule this is to be considered as a peremptory challenge, and not for cause.’ And thereupon, in deference to the said judgment, the said challenge is accordingly taken and treated by the said Patrick James Whelan and the said Attorney-General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury.”

[The record then set out that William Gamble, the

remaining one of the five last called, was sworn : that four more jurors were called, of whom one was ordered for the Crown to stand aside, and three peremptorily challenged by the prisoner : that four more were called, and all peremptorily challenged : that four more were then called—namely, George Cavanagh, James Tierney, Robert McDaniel, and Benjamin Hodgins; and it proceeded :]

“ And the said Patrick James Whelan challenges the said George Cavanagh for cause, and says that the said George Cavanagh is not indifferent between our Lady the Queen and the said Patrick James Whelan. And the Honourable John Sandfield Macdonald, who prosecutes for our Lady the Queen, says that the said George Cavanagh is indifferent between our said Lady the Queen and the said Patrick James Whelan. And hereupon triers being duly sworn to try the said issue between our Lady the Queen and the said Patrick James Whelan, say that the said George Cavanagh is indifferent between our Lady the Queen and the said Patrick James Whelan. And the said George Cavanagh is hereupon elected, tried, and sworn to speak the truth of and concerning the premises in the said indictment against the said Patrick James Whelan specified.”

[It then stated that Tierney was set aside for the Crown, and Robert McDaniel sworn ; and the challenge of Benjamin Hodgins was then set out thus :]

“ And now at this day come as well our Sovereign Lady the Queen, by Her Attorney General of the Province of Ontario, as the said Patrick James Whelan, and the said Patrick James Whelan peremptorily challenges Benjamin Hodgins, one of the jurors impanelled on the said jury, because that the said Patrick James Whelan before his peremptory challenges were exhausted challenged for cause one Jonathan Sparks, one of the said jury, and the said challenge for cause was not allowed by the said Court, nor was the said challenge for cause tried nor submitted to triers by the said Court, but the said Patrick James Whelan was required to challenge the said

Jonathan Sparks peremptorily if he desired to challenge the said Jonathan Sparks as one of the jurors of the said jury, and that the said challenge for cause should be considered as a peremptory challenge and not as a challenge for cause, and the said challenge for cause was accordingly taken and treated as a peremptory challenge, and the said Jonathan Sparks was not thereupon sworn upon the said jury; and this the said Patrick James Whelan is ready to verify.

“And Her Majesty, by the Attorney General of Ontario, says, that the said Patrick James Whelan is not entitled in law to challenge peremptorily Benjamin Hodgins, one of the jurors impanelled on the said jury, in this, that the said Patrick James Whelan had already exhausted his peremptory challenge of twenty jurors, and the challenge of the juror Jonathan Sparks for favor having been disallowed, he subsequently challenged the said last mentioned juror peremptorily, before the said twenty challenges were exhausted, is not now entitled to challenge peremptorily the said juror Benjamin Hodgins, after the said twenty jurors have been exhausted, without assigning cause therefor.

And hereupon it is considered and adjudged, and ordered by the Court here, that the said Patrick James Whelan is not entitled in law to challenge peremptorily the said Benjamin Hodgins, and the said challenge is disallowed, notwithstanding that the said Patrick James Whelan claims the right to challenge peremptorily the said Benjamin Hodgins. And hereupon the said Benjamin Hodgins is elected, tried, and sworn to speak the truth of and concerning the premises in the said indictment against the said Patrick James Whelan specified.”

[Another juror was then stated to have been called and sworn, making up the twelve, and the record proceeded:]

“And the said jurors so elected, tried, and sworn to speak the truth of and concerning the premises in the said indictment against the said Patrick James Whelan specified, to wit:” [Setting out the names of the twelve jurors sworn]

“upon their oaths say that the said Patrick James Whelan is guilty of the felony and murder aforesaid on him above charged, in the form aforesaid, as by the indictment aforesaid is above supposed against him. And upon this it is forthwith demanded of the said Patrick James Whelan if he hath or knoweth anything to say wherefore the said justice here ought not, upon the premises and verdict aforesaid, to proceed to judgment and execution against him, who nothing further saith except as before. Whereupon, all and singular the premises being seen, and by the said justice here fully understood, it is considered by the Court here, that the said Patrick James Whelan be taken to the Gaol of the said County of Carleton, from whence he came, and from thence to the place of execution, on Thursday the tenth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, between the hours of nine in the morning and four in the afternoon, and there be hanged by the neck until his body be dead.”

*J. H. Cameron*, Q. C., then, on behalf of the plaintiff in error, craved leave to assign error, which was granted.

The assignment of errors was as follows :

Michaelmas Term, 32 Victoria.

And now, on this twenty-third day of November, in this same term, before our said Court of Queen's Bench, cometh the said Patrick James Whelan into the Court here, under the custody of the Sheriff of the County of Carleton, by virtue of a writ of *Habeas Corpus* issued in that behalf, and immediately saith, that in the record and process aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this :—

That it is not alleged nor stated in the said record that the said Chief Justice, William Buell Richards, held the said Session of Oyer and Terminer, and General Gaol Delivery, by virtue of any commission to him, or to him and others, granted for that purpose, or without any commission by the order, command, or direction of the



Governor General of the Dominion of Canada, or of the Lieutenant Governor of the Province of Ontario—wherefore in that there is manifest error:

That no jury process is awarded upon the said record, nor could any such process be legally awarded by the said William Buell Richards as such Chief Justice, inasmuch as, for the reason firstly above assigned, he had no jurisdiction or authority to order or award such process, as a justice of Oyer and Terminer and General Gaol Delivery for the said County of Carleton—wherefore in that there is manifest error:

That it appears by the said record that the said Patrick James Whelan challenged Jonathan Sparks, one of the jurors impanelled and returned upon the said jury, for cause of favor, as he had a legal right to do, and that the said challenge was, contrary to law, disallowed by the said Court, on the ground that the said Patrick James Whelan had not, at the time he made such challenge for cause, exhausted the peremptory challenges to which he was by law entitled, and that until he had exhausted his peremptory challenges he could not challenge any juror on the said jury for cause, but only peremptorily—wherefore in that there is manifest error:

That it appears by the said record that the said Patrick James Whelan challenged Benjamin Hodgins, one of the said jury, peremptorily, as he had a legal right to do, and that the said challenge was, contrary to law, disallowed by the said Court, on the ground that the said Patrick James Whelan had already challenged the said Jonathan Sparks, one of the said jury, for cause: that the said challenge of the said Jonathan Sparks for cause was adjudged by the said court to be a peremptory challenge, and not a challenge for cause; and that at the time the said Patrick James Whelan challenged the said Benjamin Hodgins peremptorily, the said Patrick James Whelan had exhausted his peremptory challenges, as he, the said Patrick James Whelan, had challenged twenty jurors peremptorily, including in the said twenty challenges the challenge of the

said Jonathan Sparks for cause, as a peremptory challenge:—whereas the challenge by the said Patrick James Whelan of the said Benjamin Hodgins was the twentieth peremptory challenge of the said Patrick James Whelan; and by the said challenge of the said Benjamin Hodgins not being allowed by the said Court, the said Patrick James Whelan was, contrary to law, deprived of his right to have twenty peremptory challenges on his said trial, and was allowed nineteen peremptory challenges only, against the form of the statute in that behalf—wherefore in that there is manifest error:

And this the said Patrick James Whelan is ready to verify. Wherefore he prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid appearing, may be reversed, annulled, and altogether had for nothing, and that he may be restored to the free law of the land, and all that he hath lost by the occasion of the said judgment:

The Crown immediately joined in error, filing a joinder, as follows:—

On the twenty-third day of November, in the year of our Lord one thousand eight hundred and sixty-eight, in Michaelmas Term, in the thirty-second year of the reign of Queen Victoria:

And the said Honourable John Sandfield MacDonald, Attorney General of our Sovereign Lady the Queen, being present here in Court, and having heard the matters aforesaid above assigned for error, for our said Lady the Queen saith that neither in the record and proceedings, nor in the rendering of the judgment aforesaid, is there any error. Therefore the said Attorney General of our Sovereign Lady the Queen prayeth that the Court of our said Lady the Queen now here may proceed to examine as well the record and proceedings aforesaid and the judgment thereon given as aforesaid, as the matters above assigned and alleged for error, and that the judgment may in all things be affirmed.



*J. H. Cameron*, Q. C., for the plaintiff in error, then prayed for a concilium, which was appointed for Monday the 30th of November then next.

The following rule was drawn up :—

IN THE QUEEN'S BENCH.

Monday, the twenty-third day of November, in the 32nd year of the reign of Queen Victoria.

Patrick James Whelan, the plaintiff in error, being brought here into Court in custody by the Sheriff of the County of Carleton, by virtue of a writ of *Habeas Corpus*, it is ordered that the said writ and the return made thereto be filed. And the said plaintiff in error producing a writ of error, and praying oyer of the record and judgment against him upon an indictment of murder, and the same being read to him, the said plaintiff in error now here in Court assigns error. It is further ordered that the assignment of errors be filed; and the said plaintiff in error is now here in Court committed to the custody of the Sheriff of the County of York, charged with the matters in the said return mentioned, which matters are as follows, to wit :—that the said Patrick James Whelan was committed to and detained in the custody of the Sheriff of the said County of Carleton by virtue of a certain warrant or order of Court in the words following, that is to say : [Setting out a copy of the order mentioned in the return to the *Habeas Corpus*, ante, p. 3, note.]

To be by the said Sheriff kept in safe custody until he shall be from thence discharged by due course of law. And it is further ordered that the said Sheriff or his deputy do bring the said plaintiff in error before this Court on Monday, the thirtieth day of November instant.

On motion of *J. HILLYARD CAMERON*, Q. C.

By the Court,

(Signed) ROBERT G. DALTON.

On the 30th November, 1868, the prisoner was brought into Court. Mr. Justice Morrison having been compelled

to go to Ottawa, with the Chief Justice of the Common Pleas and Mr. Justice John Wilson, to assist in swearing in Sir John Young as Governor General of Canada, the argument was by consent postponed until Friday then next, the 4th of December, and the following rule was drawn up.

# IN THE QUEEN'S BENCH.

Michaelmas Term, 32 Victoria.

PATRICK JAMES WHELAN, <i>Plaintiff in Error;</i> v. THE QUEEN, <i>Defendant in Error.</i>	}	The plaintiff in error, Patrick James Whelan, being brought here into Court in custody of the Sheriff of the County of York, by virtue of
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a rule of this Court, is remanded to the same custody charged with the matters in the said rule mentioned. And it is further ordered that the said Sheriff do bring the said Patrick James Whelan before this Court on Friday next, the fourth day of December next, at noon. And at the request of the said Patrick James Whelan and his counsel, the argument of this case upon the concilium is postponed until that day.

On motion of MR. ROBINSON,

By the Court,

(Signed) ROBERT G. DALTON.

On the 4th December, the prisoner being present in Court, the case was argued.

*J. H. Cameron, Q. C.*, for the plaintiff in error.

As to the first error assigned:—Before the 18 Victoria ch. 92, no Court of Oyer and Terminer or General Gaol Delivery could be held without a commission by letters patent under the Great Seal of the Province, the law in this respect being the same here as in England. This, and the nature and form of the commission usually issued, will appear by reference to *Chy. Prerog.* 75; *Bac. Ab. Prerogative D.* 1; *Lane's Case*, 2

Rep. 16 *b*; 17 *Vin. Ab.* 70; 2 *Black. Com.* 346; *Bull v. Tilt*, 1 B. & P. 199; *Hawk. P. C. Book* 2., ch. 1, secs. 1, 9, ch. 5, secs. 21, 32.

By 18 Vic. ch. 92, sec. 43, it was provided that it should not be necessary to issue any Commissions, but that the Courts should be held at such times as the Judges of the Superior Courts of Common Law should appoint, and that these Judges should preside over the Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, "in the same manner and with the same authorities and powers, without the issuing of any commission or commissions for the holding of the said Courts, as they have been accustomed to do under commission." In this Statute nothing was said as to any discretion to be exercised by the Governor. The C. L. P. A. 1856, 19 Vic. ch. 43, repealed the 43rd section of 18 Vic., and sec. 152 provided that the Courts should be held "with or without commissions, as to the Governor of this Province shall seem best." The same words are repeated in 20 Vic. ch. 57, sec. 30, which repealed the 152nd section of 19 Vic. ch. 43; and this Act is repealed by Consol. Stat. U. C. ch. 11, sec. 1, which, as amended by 29-30 Vic. ch. 40, sec. 3, was the enactment in force at the time of this trial. That provides, that the Courts shall be held between certain named periods in each year, "and all such Courts shall be held, with or without commission, as to the Governor may seem best," and on such days as the Chief Justices and Judges of the Superior Courts of Common Law may name. Sec. 2 provides that in case commissions be issued they shall contain the names of the Chief Justices and Judges aforesaid, &c. By sec. 3, if no such commissions be issued the said Courts shall be presided over by one of the Chief Justices or of the Judges of the said Superior Courts," &c.; and sec. 4 provides that each of the said Chief Justices, &c., "shall possess, exercise and enjoy all and every the like powers and authorities heretofore set forth and granted in commissions issued for holding all or any of the said Courts." It is not provided, therefore, that commissions shall in all cases be dispensed with, but

only that the Courts shall be held with or without them "as to the Governor may seem best." A departure from the general law is thus authorized, but to take place only in a particular way, and it must be shewn, when there is such departure, that the way pointed out was pursued: that is, that the commission, which otherwise would have been necessary, and which is not shewn to have issued, was dispensed with by the Governor—*Ch. Crim. L. vol. I, p. 331; Rex v. Mayor of Liverpool, 4 Burr. 2244; 1 Saund. 248, 249, note 1.*

As to the second ground of error: If the first error assigned is well founded, the Judge had no jurisdiction to hold the Court at all, and consequently he could award no jury process. But assuming that he had all the powers alleged in the record, still no authority appears for the award which is stated, *i. e.*, "Therefore let a jury thereupon immediately come." The authority alleged is that only of a Justice of Oyer and Terminer—to enquire, hear, and determine. No power appears to deliver the gaol; and a special award of *Venire Facias* should therefore have been alleged. The difference between the power conferred in this respect by the commission of Oyer and Terminer and that of Gaol Delivery is clearly established, and the kind of process required in order to summon a jury depends upon the Court by which it is awarded. In a Court of Oyer and Terminer there must be a particular precept or writ of *Venire Facias*; but Justices of Gaol Delivery before their coming issue a general precept to return juries for the trial of all the prisoners, and out of those so returned and present in Court a jury is taken as required by a mere parol award—that is, by the Court ordering a jury to be called—the formal entry of which is, as on this record, "Let a jury immediately come." The authorities are uniform in upholding this distinction; and the want of a proper and authorized award of jury process is clearly a fatal objection—*Ch. Crim. L. Vol. I 506; 4 Harg. St. Tr. 744; 2 Hale P. C. 28, 260, 261, 263, 410; Foster 64; 4 Inst. 164; 2 Inst. 568; Cro. Car. 583; Hawk P. C. Book 2, ch 41, sec. 1; Bac.*

Ab. Trial (1), Juries B. 1, 6; *Co. Lit* 155 a; *Rex v. Perin*, 2 Saund. 393; *Peter Cook's Case*, 13 Howell St. T. 326; *Rex v. Serjeant*, 1 Mod. 81; *Rex v. George*, Str. 308. In our Jury Act, Consol. Stat. U. C. ch. 31, secs. 8, 10, 59, 60, 63, 68, 72, 74, 94, bear upon this question, and in some of them the expression "Oyer and Terminer or Gaol Delivery" is used, shewing a recognition of the difference. It is true that by Consol. Stat. C. ch. 99, sec. 52, any formal caption or heading is dispensed with in making up the record of any conviction on an indictment; but where the jurisdiction which the Judge had is expressly set out, though unnecessarily, it must be sufficient to warrant what is alleged to have been done under it.

Then as to the third and fourth errors, which may be considered to raise the most important objections in the case:—Nothing can be of more consequence in the administration of criminal justice than that the constitution of the jury should be free from all possible objection, and that the accused should have the full advantage of every safeguard which the law has provided to enable him to secure this right, which is of the very essence of a just trial. No innovation should be permitted, however harmless it may apparently be in the particular case, for it may lead to great injustice in others; and to this, more than to any other part of our criminal procedure, should the principle, *Principiis obsta*, be strictly applied.

The two errors assigned, depending upon the challenges of Sparks and Hodgins respectively, seem to present four questions:—1. Was the ground of challenge to Sparks good, as it is stated upon the record. 2. Was the prisoner entitled to make this challenge before his peremptory challenges had been exhausted. 3. If so, and this right was improperly denied him, does anything appear by which he is prevented from taking advantage of the mistake. 4. If not, is a writ of error his proper course.

As to the first question, there can be no doubt. The objection to Sparks, the truth of which is admitted by the pleadings, was urged as a ground of challenge to the



favor, and if sustained by the triers must have excluded him. In *Hawk*. P. C. Book, 2, ch. 43, sec. 28, it is said to have been allowed a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion beforehand that the party will be hanged. In *Peter Cook's* case, 13 St. Tr. 333, the prisoner said—"My Lord, before the jury is called, I am advised that if any of the jury have said already that I am guilty, or they will find me guilty, or I shall suffer, or be hanged, or the like, they are not fit or proper men to be of the jury," to which Lord Chief Justice Treby answered—"You say right, Sir, it is a good cause of challenge." In *Barbot's* case, 18 St. Tr. 1233, the juror was proved to have said, that if he was to be on the prisoner's jury he would condemn him; and the Solicitor-General at once said, "This is abundant cause, to be sure." *Layer's* case, 16 St. Tr. 137; *O'Coigly's* case, 26 St. Tr. 1227; and *Horne Tooke's* case, 25 St. Tr. 17, also support the objection.

2. Then, was he entitled to challenge when he did? It is said not, because he had not exhausted all his peremptory challenges; but both reason and authority are against this doctrine. The prisoner was by law entitled to twenty peremptory challenges, without assigning any cause whatever, and to as many challenges for cause as he could shew ground for, and this right is denied when he is compelled to challenge peremptorily a juror to whom he shews good cause of objection. No shew even of authority for this course can be adduced except *Brandreth's* case, 32 St. Tr. 773, where the Attorney-General, Sir Samuel Shepherd, in argument, says:—"I apprehend the right of peremptory challenge must be exercised first," and adds, "I put it to your Lordships, that that which I state most positively has never been questioned, and on reading the State Trials you will find that that which appears to have been always the practice is also founded on the principle, that the absolutely peremptory challenges must be made first, to leave those remaining upon the panel, about whose capacity to serve (when I say capacity to



serve, I mean in consequence of any objection) questions may arise, to be made out by evidence on the part either of the prisoner or of the Crown." There was no decision, however, on the point, and the Attorney-General was clearly mistaken in his recollection, for there are several cases to be found in the State Trials, where the right was claimed and exercised without objection. In *Sir William Parkyns'* case, 13 St. Tr. 75, where thirty-five peremptory challenges were allowed, the prisoner, at a certain stage, asked how many had he challenged, and was told twenty-five—"But," he said, "there are two that I gave reason for," and these were then not counted—leaving only 23. In *Peter Cook's* case, already cited, 13 St. Tr. 313, challenges for cause were taken without question before the peremptory challenges had been exhausted. So in *Christopher Layer's* case, 16 St. Tr. 137; in *John Barbot's* case, 18 St. Tr. 1233; in *O'Coigly's* case, 26 St. Tr. 1227; in the *Reverend William Jackson's* case, 25 St. Tr. 804.

In *Rex v. Stone*, 6 T. R. 527, which was at trial at Bar before all the Judges, the prisoner challenged a juror for cause, and his objection being overruled, he challenged peremptorily. No discussion appears to have taken place, but in a case of such importance the right would hardly have been admitted without remark if it had been thought questionable. [RICHARDS, C.J.—Is there any case in which the question has been discussed or decided?] None in England except *Brandreth's* case, already mentioned. That seems to be the only authority in which the right has been denied even in argument. On the other hand, the authorities against the Crown are numerous and clear. The right which the plaintiff here claimed has not only been admitted without objection in a series of cases, as already shewn, but is supported both by Coke and Blackstone. In *Co. Lit.* 158 *a*, it is said—"If a man, in case of treason or felony, challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily." This plainly shews that the challenges for cause need not precede

the peremptory challenges; and the doctrine there laid down has been affirmed since in almost every text book of authority—*Ch. Crim. L.*, Vol. I., p. 545; *Bac. Ab. Jury E.* 11; *Burn's J. Jurors*, V. 2; *Williams' Justice. Jurors*, V; *Dick. Q. S.* 189; *Hawk P. C.*, Book 2, ch. 43, sec. 10.

Blackstone, in his Commentaries, Vol. IV., p. 353, says, that one reason why such challenges are allowed is, "Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptory to set him aside." In the United States, in several cases, challenges for cause have been overruled and peremptory challenges then allowed—*McGowan v. The State of Tennessee*, 9 Yerger 184; *Freeman v. The People*, 4 Denio 315; *Carroll v. The State of Tennessee*, 3 Humphrey 315; *Lithgow v. The Commonwealth*, 2 Virginia Cas. 297; *Sprouce v. The Commonwealth*, Ib. 375; *Dowdy v. The Commonwealth*, 9 Grattan 732; *Stewart v. The State*, 8 Eng., 13 Arkansas, Rep. 720. And in *Hooker v. The State of Ohio*, 4 Hammond 348, in 1831, in the Supreme Court of Ohio, the point was expressly decided. The Judge there, as here, refused to permit a challenge for cause until the peremptory challenges had been exhausted. The prisoner was found guilty, and on error the judgment was reversed. The Court, after giving the reasons for the allowance of peremptory challenges assigned by Blackstone, already referred to, says, "For these reasons the law has wisely provided, that the right of the peremptory challenge ought to be held open for the latest possible moment, to wit, up to the actual swearing of the jury." The authorities therefore in the plaintiff's favor are clear and distinct; and apart from authority, reason is in favor of his contention. When a prisoner knows that a juror is avowedly hostile, and that he can prove good ground of objection to him there would be great hardship in refusing to listen to those

objections, and compelling him to throw away upon such juror one of his peremptory challenges, which are given to him for an entirely different purpose.

3. Then, if the cause of challenge alleged was good, and the plaintiff was entitled to have it tried, does anything appear to prevent him from bringing error for the refusal of his right? It will be said that he has waived the error, if there was any, by challenging Sparks peremptorily. But a prisoner, especially in capital cases, can waive or consent to nothing—*Regina v. Bertrand*, L. R. I. P. C. App. 520, per Sir John Coleridge, at p. 534. He cannot consent, for example, that evidence taken at a former trial shall be read from the Judge's notes—Ib. Besides, the record here shews that this was taken as a peremptory challenge "in deference to the judgment of the Court." It was, therefore, not a voluntary act on the prisoner's part, so as to preclude him from assigning error on the refusal to allow his challenge for cause. Against a non-suit so taken in a civil case a plaintiff can always move, and surely the law cannot be more strict against a prisoner when on trial for his life. The Jury Act, Consol. Stat. U. C. ch. 31, sec. 94, provides that the trial shall be by twelve jurors, "who after all just causes of challenge allowed remain as fair and indifferent." This was not such a jury, for the plaintiff had a right peremptorily to challenge Hodgins, who was one of the twelve sworn. The challenge of Sparks could not properly be counted as one of his twenty, for it was forced upon him by the erroneous judgment, and without it he had only nineteen; the challenge of Hodgins, which he claimed and was refused, was, therefore, only the twentieth.

But assuming the peremptory challenge of Sparks to have been voluntarily taken by the plaintiff, it could not affect the error now assigned. The judgment is on the record, and is erroneous. So soon as it was entered of record there was "manifest error," and so long as it remains there the conviction cannot stand.

No direct authority has been found in England or here as

to the effect of this peremptory challenge ; but there are American authorities on the point, and although contradictory, they are, on the whole, in the plaintiff's favor. *Lithgow v. The Commonwealth*, 2 Va. Cas. 297, decided in the General Court of Virginia in 1822, is directly in point. There one Irvine was challenged for cause, and his challenge being overruled, he was challenged peremptorily. The prisoner having been convicted, of embezzlement, petitioned for a writ of error, and on this point the Court said, at p. 307—" If it was an error, under the circumstances stated, to overrule the challenge for cause, this Court is of opinion that the subsequent exclusion of Irvine does not cure it, although the record shews that the prisoner had not exhausted his peremptory challenges even when a jury was finally obtained. To procure the reversal of a judgment of conviction, for an error in point of law, it is not required that a prisoner should shew that he was actually injured by it. It will be enough if the Court can be satisfied that he might have been injured. But this Court do perceive at least, by connecting the first and second bills of exceptions, how this error, if it be one, might have operated to the prejudice of the accused. He might thereby have been prevented from exercising to its utmost extent his right of peremptory challenge, as a vain and useless thing. He might have thought it better after that decision to take the first jurors that offered, rather than to excite suspicion against himself by challenging as many as the law allowed, when he had reason to believe that after all persons in the same situation with Irvine would compose his triers ; and he might have been thereby deterred, and probably was deterred, from making similar objections to others of the venire. If then, upon the case presented by the record, this Court shall decide that the objection to Irvine ought to have been sustained, the judgment against the prisoner must be reversed, and a new trial awarded." This reasoning is unanswerable, and the case here is stronger in the prisoner's favor, for the record shews that he had ex-



hausted his peremptory challenges, and that the effect of the denial of his challenge for cause was to deprive him of one. *Lithgow's* case is followed by *Sprouce v. The Commonwealth*, in the same volume, p. 375, and by *Dowdy v. The Commonwealth*, in the Court of Appeals of Virginia, in 1853, 9 Grattan 727.

In *McGowan v. The State of Tennessee*, 9 Yerger 184, decided in 1836, it was held that *unless the peremptory challenges were exhausted*, the improper overruling of an objection to a juror, afterwards challenged peremptorily, did not constitute error. In *Carroll v. The State*, 3 Humphrey 315, in the Supreme Court of Tennessee, in 1842, that case was followed, the peremptory challenges there also not being exhausted; and *The People v. Knickerbocker*, 1 Parker's Criminal cases 302, in the Supreme Court of New York, in 1851, is to the same effect. These cases are all authorities in the plaintiff's favor, or certainly not against him, for the fact of peremptory challenges remaining is expressly mentioned as a ground of judgment, and here they were exhausted.

In *Freeman v. The People*, 4 Denio 4, which will be relied upon for the Crown, it does not appear whether the peremptory challenges were exhausted or not.

In *The People v. Bodine*, 1 Denio 280, the language of the judgment goes strongly to shew that the error is complete on the refusal of the right to challenge for cause, and cannot be affected by the subsequent use or disuse of peremptory challenges.

In England, the cases of *Regina v. Mellor*, 1 Dears. & B. 472; *O'Connell v. The Queen*, 11 Cl. & F. 155; *Gray v. The Queen*, 11 C. & F. 427; *Rex v. Edmonds*, 4 B. & Al. 471, all tend to support this view.

*Stewart v. The State*, 8 English, 13 Arkansas Reports, 742, decided in 1853, is against the prisoner, but it is the only case clearly in point, and the weight of American authority is therefore in his favor. The question is not whether the prisoner has had substantially a fair trial, or whether there is anything to excite a suspicion of unfair-

ness; but has he had given to him all the rights and all the safeguards which the law allows in the formation of the jury? He has not;—for the right, which he clearly had, to Challenge Sparks for cause, has been denied to him; and he has been prejudiced by this denial, for had it been granted, Hodgins, who he desired and would then beyond doubt have been entitled to challenge peremptorily, would not have been permitted to try him. If there be any doubt as to the law, in such a case the Court will, with Tindal, C. J., in *O'Connell's* case, 11 C. & F. 480, apply the principle of decision "*Tutiùs erratur in mitiori sensu*," and will give the prisoner the benefit of it.

4. As to the last point, a writ of error is the proper mode of bringing up the question, and upon it, if the errors are sustained, a *Venire de Novo* must be awarded. The authorities shew that the denial of a right of challenge is ground of error, and this point can hardly be contested. [*Robinson, Q.C.*—That is admitted, but the Crown contends that there was here no absolute denial of a right, but a decision on matter of practice and discretion only, not examinable in error.] The judgment involved much more than that. It was an absolute denial of an important right, an erroneous judgment productive of substantial injustice, and as such it can clearly be reversed in error.—*Mansell v. The Queen*, 8 E. & B. 54; *Gray v. The Queen*, 11 C. & F. 427; *O'Connell v. The Queen*, 11 C. & F. 155.

*C. Robinson, Q. C.* and *Anderson* for the Crown. As to the first error assigned, if it be good, then all these Courts since 18 Victoria ch. 92, was passed, have been held without jurisdiction, and the proper construction of the Statutes has been overlooked by the Government, by the Courts, and by the Profession, for, as a matter of fact, except in some few instances, caused by the separation of counties, &c., no commissions have issued since that time, nor has any order been made



by the Governor dispensing with them. The meaning of the Acts, however, is, plainly, that the Courts shall be held, under commissions if commissions are issued, if not, by virtue of the Statute. Sec. 3 of Consol. Stat. U. C. ch. 11 enacts that "if no such commissions be issued, the said Courts shall be presided over by one of the Chief Justices," &c. It does not require that the omission or absence of the commission shall be directed by the Governor. Moreover, it is unnecessary to set out at large the authority of the Justice—*Ch. Crim. L.*, Vol. I. p. 720, 329, 332; *Rex v. Royce* 4 Burr. 2085; and the allegation that the Chief Justice was "under and by virtue of the Statute in that behalf duly authorized and empowered" is a sufficient averment of jurisdiction, which cannot be contradicted—*Rex v. Carlile* (2 B. & Ad. 310). The words first used in 19 Vic. ch. 43, "as to the Governor may seem best" having been re-enacted three times while the same practice has continued, is a Legislative sanction of the construction which, in practice, has for twelve years been put upon the Statutes by the Government and the Courts—See per Lord Campbell in *Mansell v. The Queen*, 8 E. & B. 73. The maxim "*Optimus interpret rerum usus*" applies. As to *Rex v. Mayor of Liverpool* (4 Burr. 2244), it is sufficient to say that the jurisdiction there arose under a *private* Act.

Then as to the award of jury process:—The distinction relied upon between Justices of Oyer and Terminer and of Gaol Delivery is found only in old authorities, and neither the origin nor the reason of it is clearly established. In 2 *Hale* P. C. 261, it is said that the reason generally given is not the reason; and the difference, admitting its existence, seems to have been one rather of practice or usage than of power or jurisdiction—*Bac. Ab. Trial* (I.), *Juries* B.; *Ch. Crim. L.*, Vol. I. p. 508. But whatever the distinction or the reason of it may be in England, no difference either of jurisdiction or practice under the two commissions, which have been usually included in one, has ever obtained in this country. By 36 Geo. III. ch. 2, a writ of

*Venire Facias* was dispensed with. The 13 & 14 Vic. ch. 55 sec. 29 directed the Justices appointed to hold any Sessions of Assize, Nisi Prius, Oyer and Terminer, and Gaol Delivery, to issue precepts to the Sheriff for the return of a competent number of petit jurors for the trial of all issues, in cases civil or criminal, at such sessions; and by sec. 30 such precepts were to be issued as soon as conveniently might be after the day for holding the Assizes should be known. The same provisions are repeated in the present Jury Act, Consol. Stat. U. C. ch. 31 secs. 59, 60; and secs. 63 and 74 expressly preserve any power, practice or form in regard to jury process existing before that Act and not inconsistent with it; and sec. 72 dispenses with the necessity in any ordinary case of suing out a *venire facias*. The one general precept has always gone under the several commissions of Assize and Nisi Prius, Oyer and Terminer, and Gaol Delivery, and the juries at the Assizes have been called for all causes, civil and criminal, from the jurors returned upon such precept. A special writ of *venire facias*, therefore, could not have been averred, because it was not issued in this case, and in practice never does issue in ordinary cases in this country—*Boulton v. Fitzgerald*, 1 U. C. R. 476; *Culbert v. Conger*, 7 U. C. R. 389.

Besides this, the objection assumes that no power of Gaol Delivery is shewn on this record, whereas it abundantly appears. The writ of error is addressed "To our Justices of Oyer and Terminer, assigned to deliver the Gaol," &c. The caption states that the indictment was found at a general session of Oyer and Terminer and General Gaol Delivery; and it is alleged that the prisoner appeared and pleaded at the same session. It may be observed, too, that this record, as regards the caption and award of jury process, follows the form always used in the Crown Office here so far back as can be ascertained, and this is a circumstance entitled to weight,—*Ch. Crim. L. Vol. I., p. 333; 1 Saund. 248, note 1.*

But both the first and second errors are answered by the

Consol. Stat. C. ch. 99 sec. 52. No caption at all is necessary, and an insufficient one therefore cannot vitiate the rest of the record. This provision was made by the 18 Vic. ch. 92, which first dispensed with commissions, and probably because it was thought useless after that to set out an authority then conferred by a public Statute.

The third and fourth errors assigned involve three questions :—1. Was the proper course pursued at the trial. 2. If not, was the omission to do so ground of error ; and, 3. If the decision as to Sparks was wrong, and might have been ground of error, is there error now on this record.

It is admitted, on the part of the Crown, that the cause of challenge alleged was sufficient. Had it been urged to support a challenge for principal cause, this might have been open to argument, but it was alleged as a ground of challenge to the favor, and in this view the authorities appear conclusively to support it.

As to the propriety of the decision—there are unquestionably strong authorities against it, and they are supported by a course of practice not hitherto questioned. It rests however entirely upon the dictum of Lord Coke, referred to, *Co. Lit.*, 158 *a.*, which has been followed in all the subsequent text books, and for which he cites no authority whatever, though he does for the other propositions which he lays down on the subject. The reason given by Blackstone is also apparently his own ; and among the few faults attributed to these two great writers are, that the former was in the habit of writing upon his own authority only—See per Best, C. J., 2 Bing. 296 ; and the latter of giving his own reasons. On this subject, too, Lord Coke is not always a safe guide. In *Winsor's Case*, L. R. 1 Q. B. 289, S. C. in Exch. Ch. 390, the prisoner's argument rested chiefly upon his dictum, that a jury sworn and charged in case of life or member could not be discharged, which was held to be clearly wrong.

The reason given by Blackstone, if ever correct, can hardly be urged now, for if the prisoner is to have the benefit of it he should be allowed to challenge first those jurors against whom he desires to shew cause, and retain his peremptory challenges to exclude them afterwards, should his proof fail. Under our law, however, the whole panel is called by lot—Consol. Stat. U. C. ch. 31, sec. 94—so that the peremptory challenges may be exhausted before any juror is called who can be objected to for cause. On the other hand, in *Brandreth's Case*, already cited, the doctrine here decided, that the peremptory challenges must be first exhausted, is stated positively by the Attorney General, and not contradicted; and Richards, C. B., affirms it upon principle, where he says (32 St. Tr. 774): “The prisoner has his peremptory challenges, and then the rest of the jury lie in common between him and the Crown”—i.e., it must first be ascertained whether a jury cannot be obtained by the use of the peremptory challenges alone; and if not, then cause must be shewn on either side for any objection. This seems both reasonable and convenient, in order to avoid useless expenditure of time; and the right of peremptory challenge being one not allowed to the Crown in any case, and to be exercised only according to caprice, there is the less reason why it should be construed liberally.

In *Arch. Crim. Plg.*, 16th Ed., p. 149, it is said “The defendant, in treason or felony, may for cause shewn object to all or any of the jurors called, after exhausting his peremptory challenges of thirty-five or twenty.” And it was upon this, the only available guide at the trial, that the decision proceeded. For this he cites no authority. It was perhaps taken from *Ch. Crim. L. Vol. I. p. 540*, where it is laid down that “after challenging thirty-five jurors in treason, and twenty in felony, the defendant may for cause shewn challenge as many jurors as may be called.” *Com. Dig.*, Indictment, M., is however cited to sustain this, and it is plain that that author did not mean to assert that the peremptory challenges should first be



exhausted, for in another place, Challenge C. 1., he cites as law Lord Coke's dictum already referred to. In two American cases, *Commonwealth v. Webster*, 5 Cushing 295, and *Commonwealth v. Rogers*, 7 Metcalf 500, it was held, in Massachusetts, that a peremptory challenge must be exercised, if at all, before the juror is questioned by the court as to his opinion or bias; but this is there regulated by statute. If it should be thought that, on whatever authority the doctrine laid down in Coke and Blackstone may have rested at first, it has since been established by practice, the next question is—

2. Assuming the decision to be wrong, is it examinable in error? It must be remembered that there was here no absolute denial of the right to challenge at all, but only of the right to challenge then in a particular manner; and no case has decided that error will lie on such a decision. The judge did not say that Sparks must sit on the jury, but that the prisoner, as the case then stood, must challenge him peremptorily if at all—in other words, he prescribed the order in which the different kinds of challenges should be taken, the peremptory challenges first, those for cause after. This was a matter within his discretion, and if so it is not examinable in error—*Mansell v. The Queen*, 8 E. & B. 103, 107, 110, 111, 113; and if not in law matter of error, it cannot be made so by being put upon the record—8 E. & B. 100. In *O'Connell's Case*, 11 C. & F. 155, the fifteen judges were unanimous that there was no error, though Lords Denman, Cottenham, and Campbell inclined to think that the challenge to the array should have been allowed. [ADAM WILSON, J.—Then the result might be to deprive the prisoner in effect not of one peremptory challenge, but of all.] Perhaps so, and it might therefore be an improper exercise of discretion; but that is not the question. The judge has undoubted discretion in many matters, such as adjournment of trials, discharge of juries, examination of witnesses, &c., where grievous injustice may be done; but it is no ground of error—*Winsor v. The Queen*, L. R., 1 Q. B. 310, 318. It may be remedied by motion for

a new trial in this country, or by application elsewhere, but not in the mode adopted here—*Mansell v. The Queen*, 8 E. & B. 110.

3. But even admitting that the decision was wrong, and that the refusal of the right to challenge for cause is ground of error, the plaintiff by his own conduct has removed the error. This is not a final, but an interlocutory or in the nature of an interlocutory judgment, which may have more or less influence upon the final result, *i.e.*, the conviction and sentence; and it would be against all principle and practice to hold that a mere erroneous decision in the course of the trial, the effect of which is afterwards removed, can avoid the final judgment. It has been argued for the plaintiff in error, that so long as the erroneous judgment remains on the record, no matter what is done after it, the mistake must be fatal; but if this be so, then if, after judgment had been given and entered of record, the Crown had ordered Sparks to stand by, or the Judge for any reason had excused him from serving, there would still have been error;—or suppose a prisoner should claim to challenge peremptorily, saying at the same time that he could shew good cause if he chose, and the Judge should then insist upon such cause being shewn; if, after the denial of the peremptory challenge had been put on the record, the prisoner should prove the cause alleged and thus exclude the juror, error would surely not lie, for the prisoner would gain instead of losing a peremptory challenge by the denial of his right; but still the erroneous judgment would be on the record. These instances shew that such a decision cannot in all cases inevitably form matter of error, without reference to what may be done afterwards, or what effect it may have on the final judgment. In an American case, *Ferriday v. Selser*, in the Court of Appeals for Mississippi, 4 Howard, 519, it is said—"It is a general rule that an appellate court will not set aside a judgment otherwise regular and proper on account of a mistaken opinion of the inferior court, which is not shewn to have influenced the final result. Thus



the supreme court of Tennessee, in *McGowan v. The State*, 9 Yerger, 184, refused to set aside the verdict, where it appeared that the juror was set aside by a peremptory challenge, who should have been refused for cause which was shewn." This is the true rule, illustrated by the very case before us. In that case the facts were the same as here, except that it was not shewn that the peremptory challenges had been exhausted.

The weight of American authority is in favor of the Crown, not of the prisoner, for though in many of the cases cited the fact of the peremptory challenges being unexhausted appears, it is not made the ground of judgment, nor could it be a satisfactory ground. In *Freeman v. The People*, 4 Denio 20, several jurors were challenged for cause, and exceptions taken to the course pursued in disposing of such challenges, but the jurors were afterwards excluded by the peremptory challenges of the prisoner. On error brought, Beardsley, J., delivering the judgment of the court, said :—" It is now urged that these exceptions are still open to examination and review in this court. I think otherwise. The prisoner had the power and the right to use his peremptory challenges as he pleased, and the court cannot judicially know for what cause or with what design he resorted to them—*The People v. Bodine*, 1 Denio, 310. He was free to use or not use them as he thought proper ; but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude these jurors, and thus virtually, and, as I think, effectually blotted out all such errors, if any, as had previously occurred in regard to them." There it did not appear whether the peremptory challenges had been exhausted or not.

In *The People v. Bodine*, 1 Denio, 310, two jurors found indifferent by triers were sworn. It was contended for the people that the prisoner could not take advantage of

errors in the trial of the causes of challenge alleged, because she had peremptory challenges remaining when the jury were completed, which she might have used to exclude these jurors. In reference to this argument it was said in the judgment that the use or disuse of the right of peremptory challenge was a fact wholly immaterial ; but it was evidently the *disuse* only that was intended, for the same judge afterwards delivered the judgment in *Freeman's Case*, holding that the use of a peremptory challenge blotted out the error, and referring to this case.

*Stewart v. The State*, 8 English, 13 Arkansas, 720, is exactly in point. The court there, referring to the two last mentioned cases, says—"If the party choses to challenge the juror peremptorily when he is not obliged to do so, he, by the exercise of his own will or caprice, has undertaken to correct the supposed error of the court, and waived the benefit of the previous exception. Because, if the decision was right, the party excepting could not have been injured by it, if it was wrong, he had the benefit of his exception ; but if at the time in doubt whether it be right or wrong, and he prefers to take the chances for an acquittal, and so elects to rid himself of the obnoxious juror by a peremptory challenge, there is no reason for holding that he can avail himself on error of the exception thus abandoned."

These two decisions, therefore, in two different States, are in all respects in favor of the Crown ; while in *Ferriday v. Selser*, 4 Howard 519 ; *The People v. Knickerbocker*, 1 Parker, 302 ; and *Carroll v. The State*, 3 Humphrey 315, the decision was that the peremptory challenge cured the error, there being also the fact that the peremptory challenges had not been exhausted. *The State v. Benton*, 2 Dev. & Bat. 196 ; *The Commonwealth v. Knapp*, 9 Pick. 496 ; *Wharton's Criminal Law*, Vol. III. Book 9, ch. 2, secs. 2944 to 3042 ; *United States v. Marchant*, 12 Wheat. 482, may also be referred to.

When the right to challenge for cause was overruled the prisoner had two courses open. He could either let Sparks go upon the jury, relying upon his

objection, and then if the judgment was wrong he would clearly have been entitled to a *venire de novo*; or he could exclude him by a peremptory challenge; and his choice was entirely free. He could not, however, obtain the advantage of doing both, and thus secure a jury with which he would have the chance of acquittal, but which could not effectually convict. He could not prevent the effect of the judgment by excluding Sparks, and yet assign error upon it, as if it had been carried out, nor is it reasonable that he should be allowed such a right.

It is said, however, that having been thus forced by the erroneous judgment to challenge peremptorily, this challenge should not have been counted as one of his twenty, and he was therefore entitled to challenge Hodgins peremptorily; more especially as the record states that this peremptory challenge was taken "in deference to the said judgment." The answer is, that he was not and could not be compelled to challenge Sparks peremptorily. Such challenge could only be taken by the prisoner, and was entirely in his option; and his motive or reason for taking it is immaterial. The question on this error must be only what did he do, not why did he do it; and the record shews plainly that he took the peremptory challenge to Sparks, and obtained the benefit of it. The analogy from a nonsuit taken in deference to the court fails. When a plaintiff accepts a nonsuit he does not take his chance of a verdict from the jury, which the prisoner here did. He abandons that chance in deference to the judgment, and therefore is allowed to move; but even then such allowance is an indulgence only, and the refusal of it would not be error. Moreover, the leave to move is reserved and is necessary for the technical reason, that otherwise the plaintiff would be out of court. A stronger analogy may be drawn from the same subject in favor of the Crown. When a nonsuit is moved for on defects in a plaintiff's evidence, and leave is reserved, the defendant may either rest on his objections or go on; but if he proceeds with the case, and in the course of his own evidence supplies the defect objected to, he cannot

afterwards succeed on the leave reserved. So here, the plaintiff in error might have rested on the denial of his right to challenge for cause, and allowed Sparks to be sworn; but having chosen to go on and by his own act exclude the juror, he has removed the objection.

The argument that a prisoner cannot consent to or waive anything does not apply. It is not a waiver or consent, in that sense, that is relied upon, but an election. A prisoner may not be able to consent to anything irregular or illegal; but he can by his own act elect between two rights, and he is bound in many instances to do so at a particular time. He cannot, for example, challenge the array after a challenge to the polls, or plead in abatement after pleading in bar. In this case he had to take one of two courses, each involving different results, and offering different advantages. He was competent to choose, and having made his election, the legal consequences of it must of course follow.

It is true that the preservation of trial by jury in all its strictness is in criminal matters of the last importance; and that in the event of any real doubt as to the law, it is better to give the benefit of it to the prisoner; but when beyond question a fair trial has been had, and the objections urged against the conviction have no bearing on the merits, their success involves a denial of justice to the community, as represented by the Crown; and this consideration should not be disregarded—See Per Lord Mansfield, in *Rex v. Royce*, 4 Burr. 2082. In this case Hodgins was challenged only to strengthen the error to be assigned upon the challenge to Sparks. No juror sat to whom any just exception could be urged, and it is not pretended that there has been any substantial injustice.

The plaintiff was remanded until Monday, the 21st December, and on motion of *O'Reilly*, Q. C., for the Crown, the following rule was drawn up:—



## IN THE QUEEN'S BENCH.

Michaelmas Term, 32 Victoria.

PATRICK JAMES WHELAN,

*Plaintiff in Error,*

v.

THE QUEEN,

*Defendant in Error.*

} The plaintiff in error, Patrick  
 } James Whelan, being brought  
 } here into Court in custody of  
 } the Sheriff of the County of  
 } York, by virtue of a rule of

this Court, is remanded to the same custody, charged with the matters in the said rule mentioned. And it is further ordered, that the said Sheriff of the County of York do bring the said Patrick James Whelan before this Court on Monday, the twenty-first day of December, 1868.

On the motion of Mr. O'REILLY,

*Counsel for the Queen.*

(Signed) ROBERT G. DALTON.

On the 21st December the prisoner was again brought into Court, and, there being a difference of opinion on the Bench, the following judgments were delivered :—

ADAM WILSON, J.—This case, though founded on the charge of murder, and for the murder of a distinguished person in this country, under circumstances which have given to it great notoriety, is, nevertheless, of no further importance at present than as it affects or is affected by the regularity of criminal proceedings, and the practice and procedure of trial by jury.

Considered in the latter aspect, no subject can be of greater consequence in the administration of justice, and more especially in that part of it by which the life or liberty of the accused is to be determined, than the fair and impartial selection, impanelling, deliberation, and finding, of jurors.

Trial by jury has long been the established forum for the settlement of all controverted rights in the Courts of Common Law.



In criminal and State prosecutions no one has ever questioned its especial fitness both for the prosecutor and the prosecuted ; and in times when the power of the Crown and the terror of the Courts were most abused in enforcing jurors, and repeated attempts were made to curtail their power and to destroy their independence, no one, even then, openly denied the sufficiency and excellency of the system.

The great object in every trial is to have it fairly conducted and decided by impartial persons, and for this purpose, in felonies, the prisoner is entitled to challenge the full number of twenty jurors without cause or question, and any greater number beyond the twenty on shewing sufficient cause for their rejection.

By this process of winnowing, it is supposed there will be secured to him as fairly constituted a tribunal as human justice and enlightenment can provide—that is, in the expressive language of the law, “twelve good and lawful men” to whom the prisoner may commit, for good or for ill, his life or liberty.

In is alleged on this record that the prisoner has not been allowed the full exercise of his legal right of challenge to the number of twenty without cause assigned, and that Benjamin Hodgins, who would, as the prisoner alleges, have been the twentieth juror so challenged, was put upon the jury against his consent, and joined in the verdict which was given against him.

The principal question then in this case is whether, from the facts on the record, this allegation is true or untrue.

And this again depends upon the questions, whether the judgment of the Court was correct or incorrect by which the prisoner was prevented from challenging Jonathan Sparks for cause before he had completed his full number of peremptory challenges,—and whether the prisoner, by subsequently challenging this same juror without cause, has or has not waived or lost his right of exception to the decision on the previous challenge for cause.

Before referring to the question of challenge, it will be

better to dispose of the exceptions which apply to the want of a commission to hold the Court at which the conviction took place, and to the alleged want of an award of jury process, and to the jurisdiction of the Judge to award it by reason of his having acted without a commission.

The statement of Hawkins, which is contained in numberless other books and decisions, is, no doubt, well settled law—"that the King, being the supreme magistrate of the kingdom, and intrusted with the whole executive power of the law, no Court whatsoever can have any such jurisdiction, unless it some way or other derive it from the Crown."—*Hawk. P. C.*, Book 2, chap. 1, sec. 1; and, sec. 9, that "all Judges must derive their authority from the Crown by some commission warranted by law."

And from this it follows, as all the precedents shew, that the commission should be specially set out under which the Court was held, when the record is made up; and that unless it is so set out the proceedings of the Court will be erroneous, because they would appear to be without jurisdiction.

Whether it was necessary to state on the record that the Court was held by virtue of a commission, or, if there were no commission, that it was so held without a commission by the order or direction of the Governor, must depend upon the effect and construction of our own Statutes.

The law now in force under which the Courts of Assize and Nisi Prius, Oyer and Terminer, and Gaol Delivery are held, and under which the Court in question was held is contained in the following provisions.

The Consolidated Statute, U. C., chap. 11, sec. 1, as amended by the 29-30 Vic. chap. 40, sec. 3, enacts that these Courts shall be held between stated seasons in the year, "and all such Courts shall be held, with or without commission, as to the Governor may seem best, and on such days as the Chief Justices and Judges of the Superior Courts of Common Law shall respectively name."

Sec. 2. Enacts that "In case commissions be issued, such commissions shall always contain the names of the Chief Justices and Judges aforesaid, one of whom, if any of them be present, shall preside in the said Courts respectively, and such commissions may also contain the names of any of the Judges of the County Courts, and of any of Her Majesty's Counsel learned in the law of the Upper Canada Bar, one of whom shall preside in the absence of the Chief Justices and of all the other Judges of the said Superior Courts.

Sec. 3. "If no such commissions be issued, the said Courts shall be presided over by one of the Chief Justices or of the Judges of the said Superior Courts." Then provision is made, in case of the absence of the Superior Judges, for one of them appointing a County Court Judge or Queen's Counsel to preside.

Sec. 4 enacts that, "Each of the said Chief Justices," &c., "presiding at any Court of Assize and Nisi Prius, or of Oyer and Terminer and General Gaol Delivery, shall possess, exercise and enjoy all and every the like powers and authorities heretofore set forth and granted in commissions issued for holding all or any of the said Courts."

Sec. 5 dispenses with associate Justices in any commission of Oyer and Terminer and General Gaol Delivery, or at any such Court; and sec. 6 reserves the power to the Governor of issuing special commissions when he deems it expedient.

The history of Commissions in this Province seems to be as follows:

By the 32 Geo. III. ch. 1, sec. 3, it was declared that after the passing of that Act, "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same."

By the 34 Geo. III. ch. 2, secs. 17, 19, the Governor was empowered to issue Commissions of Assize and Nisi Prius for the trying of all issues joined in the said Court, (*i. e.* the Court of King's Bench, established by that Act

as a court of original jurisdiction with the most plenary powers), in any suit or action arising in any of the districts of the Province.

The 2 Geo. IV. ch. 1, which repealed the last statute, re-enacted it in substance.

By the 7 Wm. IV, ch. 1, sec. 8, this enactment was repealed, and provision was made as before, for commissions of Assize and Nisi Prius; and the Act further provided, "that in like manner commissions of Oyer and Terminer and General Gaol Delivery shall be issued into the several districts of this Province twice in the year, within the periods aforesaid."

Until the Act of 1837 there was no statutory provision for holding, or for issuing commissions for holding, Courts of Oyer and Terminer and Gaol Delivery in this Province. Yet we know that from a period as early as the establishment of the King's Bench, in 1794, down to the passing of the Act of 1837, these criminal Courts were regularly held by commission from the Crown at the same time and by the same Judges who took the Courts of Assize and Nisi Prius, and that from 1837 until the 18 Vic. ch. 92, these commissions continued to be issued, until they were done away with by the last mentioned Act.

The history of the dispensation of commissions is as follows:

By the 18 Vic. ch. 92, sec. 43, it was enacted that it should not be necessary to issue any commissions of Assize, &c., but that the said Courts should be held at such times, &c., and the Judges should preside over them with the same authorities, &c., without the issuing of a commission for holding the same, as they had been accustomed to exercise under a commission.

This Statute made no reference as to commissions issuing or not issuing "as to the Governor may seem best."

By the 19 Vic. ch. 43, sec. 152, these words last referred to were introduced.

And by the 20 Vic. ch. 57, sec. 30, repealing the last mentioned section, these words were still continued, and



they were embodied in the Consol. Stat. U. C., ch. 11, sec. 1, and in the 29-30 Vic. ch. 40, sec. 3, before mentioned.

Conceding, then, that by the common law the Courts of Oyer and Terminer and Gaol Delivery could not have been held without a commission, and that such special authority should always appear of record, the question is, is it necessary, under the provisions of the Statutes which have been referred to, that there should have been a commission, or that it should have appeared whether there was one or was not one, or whether it seemed or did not seem best to the Governor that there should have been, or that there should not have been, a commission.

It is quite plain that these Courts are to be held with a commission or without one, "as to the Governor may seem best."

It is also plain that the same course is to be pursued, so far as the superior Judges are concerned, whether a commission issues or does not issue—that is, one of them is to preside if present; and that the only difference is, that if one of the superior Judges be not present, then, in case of a commission, one of the Judges of the County Court or a Queen's Counsel *named in the commission* may preside in his stead; and if there be no commission, one of the same class of persons—namely, a County Court Judge or a Queen's Counsel,—*to be appointed by one of the superior Judges*, may preside.

As therefore one of the superior Judges is to preside in these Courts in any event if present, and as they must be named in the commission if there is one, it seems of no kind of consequence, so far as any of them or their powers may be concerned, whether they are acting under a special commission or not.

But it may be necessary, if a County Court Judge or Queen's Counsel has taken the Court, that the roll should shew whether there was or was not a commission, because he is not to be a Judge under all but only under special circumstances—namely, in the absence of all of the



superior Judges, and upon being named in the commission or specially deputed by a superior Judge to act. The authority of the superior Judges is general, determinate, and irrevocable, by Statute ; the authority of the others is special and contingent.

While therefore the authority of the one class need not appear, the authority of the other must be shewn to justify their assumption and exercise of it.

The practice has been, ever since the Act of 1855 was passed, for the Judges—and notwithstanding the alteration of that Act by the Act of 1856—to proceed without enquiry of there having been any order or direction of the Governor with respect to commissions ; and it has been equally the practice for the Governor to make no order in the matter. It must therefore have been all along assumed that the fact of its having “seemed best to the Governor” *not* to issue a commission, was sufficiently evidenced by the fact of its not appearing that he had in truth made an order respecting it.

This is the construction which must have been put upon the Statute by the Legislature, for the 19 Vic., ch. 43, the Act of 1856, has been altered and re-enacted three different times, and yet the practice has continued the same throughout all these changes.

It may, therefore, be presumed, in so important a matter, that it was with the knowledge and approval of the practice that has been pursued by the executive and judicial authorities under this Statute, that the new legislation was based ; and the reference made by Mr. Robinson to the language of Lord Campbell in *Mansell v. The Queen*, (8 E. & B. 73) has a direct application to this point.

It appears then to me :—1. That as the Judges appoint the days for holding these Courts ; 2. As they must, commission or no commission, preside in them, if present ; 3. As they have the like powers in the one case as in the other ; 4. As they have the sole power of summoning jurors for such Courts ; and they are to do this “as soon as conveniently may be after the commission or other day

is known," which day they alone can fix—Consol. Stat. U. C. ch. 31, sec. 60; 5. And as the practice has been for the Judges to take these Courts without regard to any order of the Governor, or enquiry whether there was such an order or not; and as the practice has also been for the Governor not to make such an order, and not to issue commissions, all parties conceiving the Statute sufficient for the purpose—that it was not necessary it should have appeared on the record whether the Chief Justice, who held this Court, acted under a commission or without one, or that it should have appeared whether the Governor made an order with respect to a commission for the Court or did not make it.

The record shews the Court was taken by a person competent by Statute to hold it either with or without a commission; and as no special commission is set out, it must be assumed the Chief Justice was acting under his Statutory authority alone; and as a Judge of Assize, as such, by force of the Statute 27 Edw. I. ch. 3, may deliver gaols without any special commission for that purpose (*Hawk. P. C. Book II. ch. 7, sec. 5; Dyer, 99, pl. 62*), the record fully shews the Chief Justice possessed the requisite authority on this occasion.

I think, therefore, the first error which has been assigned fails.

The second error assigned is, that no jury process is awarded on the record. This I take to be a distinct ground of error; but upon referring to the record there seems to be no ground for it. The roll contains the usual award of *venire facias*. The assignment then proceeds: "nor could such process be legally awarded by the said William Buell Richards, as such Chief Justice, inasmuch as, for the reason firstly above assigned, he had no jurisdiction or authority to order or award such process as a Justice of Oyer and Terminer and General Gaol Delivery."

The disposal of the first exception must dispose of this one also, depending as it does on the alleged want of a special commission.

The award is, that the Chief Justice, after issue joined, directed a jury to come. Now this may well enough be done—according to the authority of *Hawk. P. C. Book 2, ch. 41, sec. 1*; 1 *Chitty, Cr. Law* 146, and *Peter Cook's case, 13 State trials* 327-8,—by the Judge, acting as a Judge of Gaol Delivery.

The reason is, because there has been a previous precept issued for the return of jurors to that Court; but that is the very course prescribed by our Statute to be taken, not only by the Judge of Gaol Delivery, but by the Judge of Oyer and Terminer as well. The jurors then being present, the Judge from among them directs a jury to come or be impanelled for the trial of the particular issue before him.

The Consol. Stat. U. C. ch. 31, sec. 59, provides that, "The Judges, Justices and others to whom the holding of any Sittings or Sessions of Assize and Nisi Prius, Oyer and Terminer, Gaol Delivery, Sessions of the Peace, or County Court, by law belongs, or some one or more of such Judges, Justices or others, shall for that purpose issue precepts to the Sheriff, or other proper officer or minister, for the return of a competent number of Grand Jurors, for cases criminal for such sittings or sessions, and of a competent number of Petit Jurors for the trial of such issues or other matters of fact, in cases criminal and civil, as it may be competent to such petit juries to try at such sittings or sessions according to law."

And by sec. 60, these precepts are to be issued "as soon as conveniently may be after the commission or other day is known."

The persons to whom the holding of the Sittings of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, and Sessions of the Peace by law belongs, are the Judges of the Superior Courts of Common Law.

The Chief Justice is and was one of them. He had the power to issue, and it must therefore be assumed he exercised that power and issued, his precept either alone or jointly with his fellows, or that they, or some or one of them did so, for the return of a competent number of jurors for the Court in question.

These jurors when brought there were for the trial of such issues and other matters of fact in cases criminal and civil as it was competent for them by law to try, and the award on the roll is quite consistent with the provision of the Statute, that the Judge of Oyer and Terminer directed a jury to come from among those who had been summoned for the purpose.

But it is said this could only have been done by a Judge acting as a Judge of *Gaol Delivery*, and not as a Judge of Oyer and Terminer, and many authorities were cited on this point. And it was contended, in order to give force to this view, that the record shews the Chief Justice was acting only as a Judge of Oyer and Terminer.

The record shews that the Queen had sent to the Justices of Oyer and Terminer for the county of Carleton, assigned to deliver the Gaol of the county and also to hear and determine, &c., the writ of error which is set out. The writ then follows.

The return to the writ shews that at a General Session of Oyer and Terminer and General Gaol Delivery, held before the Chief Justice duly assigned and under and by virtue of the Statute in that behalf duly authorized and empowered to enquire, hear and determine, &c.,—setting out the Oyer and Terminer authority only, and not an authority for Gaol Delivery—it was presented, &c.

The record then shews throughout that proceedings were had at the same session of Oyer and Terminer and General Gaol Delivery.

I am not satisfied that a full authority does not appear on the record, for Justices of Oyer and Terminer *as such* may be empowered to deliver the gaol, as well as to hear and determine, and if their authority to hear and determine appears, the other powers conferred upon them to deliver the gaol, being made incident to and dependent on their functions as Justices of Oyer and Terminer, may be properly exercised by them in the character of Justices of Oyer and Terminer.

Nor am I satisfied that there is the distinction between



Justices of Oyer and Terminer and Justices of Gaol Delivery, as to their right and power to summon or to impanel a jury to appear instanter out of the general panel returned by the Sheriff.

But, however these two points may be, I am of opinion our Statutes make no difference between these two Courts, and that the one may as freely exercise all the powers and jurisdiction which the other can. See particularly sections 63, 69, 70 and 72, of the Jury Act, Consol. Stat. U. C. ch. 31.

The Chief Justice had therefore ample power, as a Judge of Oyer and Terminer, to call a Jury instanter before him, from the general panel summoned for the occasion, as a Judge of Assize, Nisi Prius, or Gaol Delivery had.

The second ground of error fails also, in my opinion.

The remaining grounds of error relate to the challenge of the jurors.

The third error assigned is, that the prisoner challenged Sparks for cause, which challenge was disallowed by the Court on the ground that the prisoner could not challenge for cause until he had first exhausted his peremptory challenges.

If this were all that was stated there would not have been any improper ruling, for nothing more would appear than that the Judge decided that the peremptory challenge should first be taken and then the challenges for cause; and this might have been a mere rule of practice for the occasion, to avoid confusion, which the Judge, I conceive, had full authority to make and enforce.

Suppose there had been two prisoners for trial. The Judge, I think, might have said to one of them, "You A. B. must challenge first, and you must make your peremptory challenges before you challenge for cause," and then have allowed the other prisoner his challenges in the like order; and this could not have been ground of error

*Brandreth's case*, (32 State Trials 771), is I think to this



effect. It relates to the mere order, convenience, and arrangement of making challenges, and it does not profess to lay down the rule that there can be no peremptory challenges unless made before the challenging for cause.

In *Chitty's Criminal Law*, Vol. I. 540, it is said, "After challenging thirty-five jurors in treason, and twenty in felony, peremptorily, the defendant may, for cause shewn, challenge as many jurors as may be called, so as to exhaust one or more panels, if his causes of objection be well founded." But this does not mean that the challenges for cause cannot be made till after the peremptory challenges have been exhausted, for it is directly against the statement on page 545, that, "if a jurymen be challenged for cause and pronounced impartial, he may afterwards be challenged peremptorily, for otherwise the very challenge might create in his mind a prejudice against the individual who made the objection."

In *Roscoe's Criminal Evidence*, 9th ed., 206, and *Arch. Crim. Plg.*, 16th ed., 149, it is stated also in similar terms as in page 540 of *Chitty's Criminal Law*.

But in none of these is it nor can it be meant that the peremptory challenges, as a rule of law, must be first taken.

None of these writers intended to contradict themselves, or the authority of *Co. Lit.* 158 a; *Hawk. P. C.* Book 2. ch. 43. sec. 10; *Com. Dig.* "Challenge" C. 1, or the authority of the numerous cases in which the rule as laid down in these older authors has been constantly followed.

The only two cases I have seen directly in favour of the course which was followed here are *The Commonwealth v. Rogers* (7 Metcalf 500) and *The Commonwealth v. Webster* (5 Cushing 295).

There must be an order of proceeding observed to insure accuracy and despatch, and if all that was done here had been done with that view no objection could have been made to it.

In *Swan and Jeffery's case*, *Foster C. L.* 106, it is said that one of the prisoners being indicted for petit treason

and the other for murder, the Court decided that if the prisoners did not challenge they might be tried together, but if they did challenge they must be tried separately, for the number of their challenges was different.

This, I apprehend, was said merely to guard against inconvenience.

Some of the instances of taking proceedings in due order may be stated as follows:—

A prisoner must plead in abatement before he pleads in bar. He cannot challenge at all till a full jury appears. He must challenge to the array before he challenges the polls. He must abide by his peremptory challenge when he has made it, and he cannot withdraw it and challenge another juror instead—*Rex v. Parry* (7 C. & P. 838). He must shew all his causes of objection before the Crown is called upon to shew cause—*Chitty Cr. L.*, Vol. 1, p. 534; *Arch. Crim. Plg.*, 16th Ed., p. 146. Whichever party begins to challenge (this is in civil actions, but it would equally apply in criminal cases, as between different prisoners) must finish all his challenges before the other begins—*Co. Lit.* 158 *a*; *Ch. Arch. Pr.*, 11th ed., 436. And all challenges of the same kind and degree must be suggested against the juror at the same time—*Co. Lit.* 158 *a*; *Chitty Cr. L.* Vol. I., p. 545.

As this assignment of error does not indicate the real objection, I must refer to the other part of the record to see what it is.

The record states that the prisoner challenged Jonathan Sparks for favor: that the Crown alleged the prisoner was not then entitled to challenge Sparks for favour, as he had not exhausted his twenty peremptory challenges, and that the prisoner demurred to this answer as not sufficient in law; but there is no joinder in demurrer. It may not have been necessary (4 Burr. 2085); perhaps it was the Attorney General who should have demurred, as all the facts appeared of record on which the demurrer would have been founded. If his answer can be taken as a demurrer, there may then be a complete, though informal, joinder.

The judgment of the Court was: "I over-rule the demurrer. I decide that the prisoner's challenge is good as a peremptory challenge, and not as a challenge for cause; and if his peremptory challenges of twenty, including this, are exhausted, I rule this is to be considered as a peremptory challenge, and not for cause."

As a strict proposition of law, this decision was not, I think, correct, for the prisoner had the right to challenge to the favor before he had made all or any of his peremptory challenges. He had the right to deal with them when and in what manner he pleased, subject only to those necessary and convenient rules for the conduct of business, which the Court might have seen fit to adopt.

If a rule had been made that all peremptory challenges should be first taken, then on Sparks being first called he would not have been challenged peremptorily, but would have gone into the jury box, not however to be sworn, but to abide the result of all the challenges. When the peremptory challenges were through, the prisoner would proceed with his challenges for cause, and then he would except to Sparks on this ground. In this way regularity would have been preserved, and the prisoner would have had all his legal challenges; and so far the Chief Justice had the power to regulate the proceedings; but he had not the right, in any way, to declare that Sparks, who was challenged for cause, should not be so challenged, without any trial or enquiry, and that he should be computed as one of the twenty peremptory challenges, for this was to take the right of challenge from the prisoner and transfer it to the Court, and to deprive him of a strictly legal right without his leave.

The prisoner was thus made to throw away his challenge on Sparks, whom he had the right to exclude without the loss of his peremptory challenge, and to accept of Hodgins, whom he had the right to reject without cause.

If the case rested here I should be bound to say there was error on this record; for if this could be done as to one person it might equally be done as to twenty, and the prisoner would effectually be deprived of the whole of his

peremptory challenges ; and such a proposition cannot certainly be maintained.

But the roll shews that “ thereupon, in deference to the said judgment, the said challenge is accordingly taken and treated by the said Patrick James Whelan and the said Attorney General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury.” And the question is, whether—as the prisoner and the Attorney General have both taken and treated this juror, though in deference to the judgment of the Court, as peremptorily challenged, by reason of which he was not sworn on the jury—the prisoner can afterwards be heard to say that the juror shall not be counted as one of the twenty, but that he has still the right to challenge the full complement of twenty without including Sparks as one of them.

When the prisoner was directed to challenge Sparks peremptorily, a wrong was done to him. He had the power to object to this, in which case, if Sparks went upon the jury, there would have been a mistrial, and the proceeding would have amounted to error.

But suppose the Crown had ordered the juror to stand by, upon the prisoner refusing to set him aside peremptorily, or suppose the prisoner had challenged the juror for crime, which disqualified him, or on the ground of non-qualification for want of property, and such challenge was improperly over-ruled, and he thereupon challenged the juror for favor, which was allowed,—could a wrong judgment on any of these points, followed by no result prejudicial to the prisoner, have been ground of error ? I think not.

If, then, the mere mistaken judgment be not the cause of complaint, what is it the prisoner complains of ?

It is that, after challenging Sparks peremptorily, he was not allowed to challenge peremptorily the full number of twenty, excluding Sparks from the number, by reason of which Hodgins was put upon the jury, whom he says he had the right to exclude.



Should Sparks, then, on all the circumstances detailed in the record, have been computed as one of the twenty, or should he not?

If he should there is no error, if he should not there is error.

The ground on which it is said Sparks should be considered as one of the twenty is, that the prisoner must be taken to have challenged the juror voluntarily after the determination of the Court against him, and that it is of no consequence whether he did so in deference to the judgment of the Court, or in obedience to or in acceptance of that judgment—if there be any difference between the one expression and the other.

The answer of the prisoner to that is, that he was not acting voluntarily, but by the pressure of the judgment; and that he should not be held to have waived his right, and that he could not and cannot by law consent to any act to his own prejudice.

The first question, then, is, could he consent to give up this objection, or waive, release, or abandon it?

The general saying is, that a prisoner can consent to nothing. This is stating the case too generally.

He can consent to nothing manifestly irregular, as that his wife should be examined as a witness, or that the witnesses should be examined without being sworn—*Barbat v. Allen* (7 Ex. 609); nor that admissions made by his attorney with the opposite attorney out of Court should be read as evidence in the cause—*Regina v. Thornhill* (8 C. & P. 575); nor, perhaps, that the evidence of witnesses given on a former trial should be read in place of a new examination of the witness, although the witness was present in Court and was sworn and heard his evidence read over, and the parties were told they were at liberty further to examine and cross-examine him—*Regina v. Bertrand* (L. R. 1 P. C. 520); although this course had been adopted in several instances by consent of the prisoner—*Rex v. Streek* (2 C. & P. 413); *Rex v. Foster* (7 C. & P. 495).



But to say generally that he can consent to nothing is not correct.

If the cause were on the *Nisi Prius* side of the Court, he might consent to go to trial without a notice of trial, or upon an irregular notice. He might consent to secondary evidence being given, I am disposed to think, although no notice to produce had been served. He might consent to withdraw a plea in abatement. His consent was frequently asked and required when adjournments were made during the trial, or the jury were allowed to separate before verdict—*The Queen v. O'Connell* (7 Irish L. Rep. 272, 288, 337, 338) shews how strongly the different Judges relied on the consent and compact of the defendant; and many other cases are to the same effect. So his consent was frequently asked when the jury were discharged because they could not agree, or from some other cause. And he may withdraw his plea of not guilty and plead guilty.

The following cases relate to some of these points: *Edwards' case* (Russ. & Ry. 224); *Chitty Crim. L.* vol i. pp. 629, 630, 436); *Rex v. Stokes* (6 C. & P. 151).

In *Regina v. Middlemore* (6 Mod. 212), it was consented to by the defendants, who were indicted for a riot, that the prosecutor should pitch upon three or four of them, and proceed only against them, the rest entering into a rule, if they were found guilty, to plead guilty too; and this was said to be done frequently, to prevent the charges of putting them all to plead.

This course would not perhaps be taken now, though it might be done on an indictment for a nuisance to a highway, if the facts shewed it to be a proceeding substantially for the trial of a civil right.

The prisoner might consent to withdraw or release his challenge altogether—Sir Thomas Raym. 473; *Rex v. Savage* (1 Moo. C. C. 51); *O'Connor's case* (26 State Trials, 1230-31); or to accept the juror on his challenge being overruled; or if, after his challenge was disallowed, the Crown then challenged him, and the prisoner objected to it unless the Crown shewed cause in the first instance,

or he contended the cause shewn by the Crown was insufficient, this in my opinion would be a consenting to the juror as a proper juryman to be admitted to try the cause, or a waiver of all objection to him; and the prisoner could not after that revive his own original exception?

So he might consent that the jury should take with them plans or writings, not under seal, which were given in evidence. *Chitty Cr. Law*, vol I. p. 633-4..

So he may lose an advantage by not taking it in due time. *Regina v. Ellis* (Car. & Marsh. 564); *The King v. Marsh* (6 A. & E. 236).

It is said, that if one party apprehend the array will be challenged on the ground of relationship between himself and the Sheriff, he may have the process directed to the Coroner, with the consent of the other party; and if the other do not consent, but insists there is no cause for the change of process, he cannot afterwards take advantage of the objection which he has himself alleged to be futile—*Chitty Crim. Law*, vol. I. p. 539, citing *Bul. N. P. 306*; 5 Rep. 36 b, and other cases.

The prisoner had no vested interest in any particular juror—per Lord Campbell, C. J., in *Mansell v. The Queen*, (8 E. & B. 79). The right which the prisoner had was not to select but to reject jurors.—*United States v. Marchant* (4 Mason 160; Wheaton, 480).

I am of opinion, on the whole, then, that this was a matter which the prisoner could consent to give up, waive, or release.

But the material and next inquiry is, whether the prisoner did waive his right of complaint—the overruling of his challenge of Sparks for favor—by taking and treating Sparks as a juror challenged peremptorily, in deference to the judgment of the Court.

I may here say I can attach no precise meaning to the expression, “in deference to the judgment of the Court.” I cannot say that it implies a declining of the judgment, but a submission to it, more than it does an acceptance of it. The *Nisi Prius* colloquial term, indefinite though it

be, may have some better understood signification than the words can possibly have when imported into an Error roll : see *Wilkinson v. Whalley* (5 M. & G. 590).

What the prisoner did do in fact was to take and treat Sparks as a juror who was peremptorily challenged by him, and to exclude him from the jury.

If he had not done so, Sparks might have been on the jury. By excluding him the prisoner gained an advantage to himself.

The Court determined he was not to be taken off for cause, and the prisoner asserts he was not off peremptorily. Yet he must have been discharged in one of these ways. It is certain he was not removed for favor ; and it is alleged on the record he was removed peremptorily by the prisoner himself.

No direct information is to be had from the English reports on this question. The authorities applicable to it are those which were cited in the Courts of the United States.

The case of *Stewart v. The State* (8 English's Reports, being the thirteenth volume of Arkansas Reports, 720, decided in July, 1853,) is very much in point. There challenges for favor had been disallowed, and the prisoner put to challenge peremptorily, which he did. On Error brought the Court said, p. 742 : " If the party chooses to challenge the juror peremptorily when he is not obliged to do so, he, by the exercise of his own will or caprice, has undertaken to correct the supposed error of the Court, and waived the benefit of the previous exception. Because, if the decision was right, the party excepting could not have been injured by it, if it was wrong he had the benefit of his exception ; but if at the time in doubt whether it be right or wrong, and he prefers to take the chances for an acquittal, and so elects to rid himself of the obnoxious juror by a peremptory challenge, there is no reason for holding that he can avail himself on error of the exception thus abandoned." And after referring to the language of the Court in 4 Denio, 9, below quoted, the con-

clusion is, "Such, we think, is the law applicable to the case now under consideration."

In *Freeman v. The People* (4 Denio, 61), in the Supreme Court of the State of New York, decided in 1847, on a precisely similar question, the disallowance of challenges for favor and the jurors being challenged then peremptorily, the Court said: "It is now urged that these exceptions are still open to examination and review in this Court. I think otherwise. The prisoner had the right and the power to use his peremptory challenges as he pleased, and the Court cannot judicially know for what cause or with what design he resorted to them. He was free to use or not use them, as he thought proper; but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude these jurors, and thus virtually, and, as I think, effectually blotted out all such errors, if any, as had previously occurred in regard to them. But the case of the juror Beach stands on other grounds. He was first challenged, as is said, for principal cause, which, after evidence had been given, was overruled by the Court. He was then challenged for favor, but the triers found him to be indifferent. No peremptory challenge was made, and he served as one of the jury. As to this juror, every exception taken by the prisoner's counsel is now here for examination and review." See also *The People v. Bodine* (1 Denio, 281).

In some cases the disallowance of a challenge for cause was held to be waived by a peremptory challenge of the same juror, if the prisoner had not exhausted all his peremptory challenges when a full jury was formed; as in *McGowan v. The State* (9 Yerger 184, Tennessee, decided in 1836), *Carroll v. The State* (3 Humphrey 315, Tennessee, decided in 1842).

In other cases the fact of the prisoner not having ex-



hausted all his peremptory challenges has been held to make no difference, and the exception has still been open to him on error—*Lithgow v. The Commonwealth* (2 Virginia cases, 297-307, decided in 1822), *Sprouce v. The Commonwealth* (*Ibid.* 375), *Dowdy v. The Commonwealth* (9 Grattan, 732-7, Virginia, 1852).

The reasoning in *Lithgow's* case was put very strongly in support of the prisoner's contention. The Court said, p. 307 : " If it was an error, under the circumstances stated, to overrule the challenge for cause, this Court is of opinion that the subsequent exclusion of Irvine does not cure it, although the record shews that the prisoner had not exhausted his peremptory challenges, even when a jury was finally obtained. To procure the reversal of a judgment of conviction, for an error in point of law, it is not required that a prisoner should shew that he was actually injured by it. It will be enough if the Court can be satisfied that he might have been injured. But this Court do perceive at least, by connecting the first and second bills of exception, how this error, if it be one, might have operated to the prejudice of the accused. He might thereby have been prevented from exercising to its utmost extent his right of peremptory challenge, as a vain and useless thing. He might have thought it better after that decision to take the first jurors that offered, rather than to excite suspicion against himself by challenging as many as the law allowed, when he had reason to believe that after all persons in the same situation with Irvine would compose his triers; and he might have been thereby deterred, and probably was deterred, from making similar objections to others of the venire. If, then, upon the case presented by the record, this Court shall decide that the objection to Irvine ought to have been sustained, the judgment against the prisoner must be reversed, and a new trial awarded."

It was argued in *Vicars v. Langham* (Hob. 235) that after praying a tales the party had waived his right of challenge to the array; but it was answered there was no waiver, as there could be no challenge to the array till a full



jury appeared, and a tales was necessary to form a full jury.

If the party challenge *proper defectum*, as for want of property qualification, and that be overruled, he may challenge for favor—21 *Vin. Abr.* 274, pl. 3, 4.

There is very great force in both views of considering the question. For the Crown it may be said, the prisoner was not bound to challenge peremptorily, and by doing so he did gain some benefit, for he excluded the juror from the panel; and instead of relying on his exception, he chose to go to trial and run the chance of an acquittal. By challenging peremptorily he may, too, have put the Crown Counsel off his guard, for if, instead of challenging peremptorily, he had refused to exercise this right because he did not intend to accept the judgment of the Court, the Crown Counsel might have put the juror by to have avoided the difficulty. And this point is one which is suggested on the record; for after the disallowance of the challenge for cause, and after the ruling that the challenge of Sparks was to be considered as a peremptory challenge, it is said, "and thereupon, in deference to the said judgment, the said challenge is accordingly taken and treated by the said Patrick James Whelan *and the said Attorney General* as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury."

For the prisoner it may be said, that a wrong was done to him by the judgment pronounced, and which was not one on a mere matter of convenience or practice as to proceeding in a particular manner and in a certain special order, but it was a decision that the challenge for favor, which might have been admitted as sufficient or which if tried might have been found to have been sufficient, should not be allowed at all, but should be taken and counted only as a peremptory challenge, by reason of which he was made to forfeit one of his peremptory challenges:—that the overruling of this exception may have prevented or deterred the prisoner from challenging for cause the other four jurors who were still required to complete

the panel after Sparks was called :—that it must be taken that the prisoner did not accept of this judgment, but that he submitted to it as a matter he could no longer dispute at that time :—that if this course can be pursued, and is to be maintained, the prisoner may be deprived of every one of his peremptory challenges, as well as of one of them :—that the extravagance and danger of such a proceeding shew it cannot be law ; and that, as the question is not one of degree but of principle, the rule is as applicable to the deprivation of the prisoner of one of his challenges as of all twenty of them :—that the prisoner cannot be concluded from excepting to the disallowance of his challenges, even although the Crown may have lost the opportunity of setting the juror aside in case the prisoner had refused to challenge him peremptorily, for the Crown created the difficulty, and might have obviated it, even after the judgment, by having the juror stand aside, irrespective of the prisoner declining to challenge him, and it was as much or more the business of the Crown counsel to have done this, if he desired to remove the difficulty, than it was of the prisoner ;—and that the judgment with respect to Jonathan Sparks must be presumed to have been an injury to the prisoner, by deterring him from exercising his rights against the other jurors called, although he did not challenge them, and although no apparent result or injury followed : that it is an injury in contemplation of law, the extent or effect of which is not enquirable into.

I do not doubt that the decision that Sparks should be peremptorily challenged was a wrong done to the prisoner, but whether it would be productive of injury to him or not would depend on circumstances. I do not think it is so necessarily in law. It would not have been an injury to him if he had declined to challenge Sparks peremptorily, and the Crown had thereupon set the juror aside, for the juror would have been excluded, which was the principal object the prisoner had, and excluded without the prisoner losing any challenge or right.

And it would not have been an injury to him, if after the

decision he voluntarily, and not out of mere deference to the Court,—whatever that may mean,—accepted the juror or assented to challenge him peremptorily.

And I think it would not have been an injury to him, if, on his refusing to challenge peremptorily, and on the challenge of the Crown, he opposed the Crown challenge. Nor do I think it would have been an injury to him, if he had still had peremptory challenges remaining to him after having been deprived of the challenge as to Sparks.

I do not think the mere erroneous decision was incurable, or that the effect of it could not have been accepted, waived, or released.

If it were attended with no result, as the loss of a challenge or some such damage, I do not think it would remain open for ever to the party as a ground of error.

If, for instance, the challenge had been for want of property qualification, and the challenge had been wrongly disallowed, and the prisoner then challenged the juror for cause, which was allowed, it cannot be conceived that after a trial and conviction the whole proceeding could have been reversed for the erroneous decision as to the qualification, attended, as it would have been, with no result, wrong, or injury.

I do not think it is to be presumed that the prisoner was deterred from making other challenges for cause in consequence of this decision, or that he had such other challenges to make, there being no such evidence on the record of such a fact. If he had other challenges to the favour to make, he should have made them, and have had them and their disallowance entered of record, and then the Court would have seen what wrong he had suffered; but such matters should not be left to conjecture or suggestion.

Suppose, for instance, there had been two indictments against the prisoner, and in one of them such a decision as the present one had been made, could it have been alleged as error in the second case that the prisoner was deterred from making his lawful challenges by reason of the wrongful ruling in the first case, and must it be assumed that

he had such challenge to make in the second case? I think not.

The prisoner would be obliged, notwithstanding the special ruling in the first case, to renew his exceptions in the second case, and so I think Whelan should have done with respect to each particular juror in this case, in order to establish a cause of error or ground of complaint with respect to those jurors who were called after Sparks,—*Mansell v. The Queen* (8 E. & B. 57, 58, 59, 60, 61, 62).

I am not inclined to adopt the reasoning in *Lithgow's* case to the extent to which it is urged, for I see it leads into too wide a field of conjecture, which cannot be safely pursued in discussing questions of law in a Court of Error, and when it is considered that what may be done for the prisoner upon conviction, must equally be done for the Crown on an acquittal.

I am not of opinion either that the mere fact of challenging without cause, when the Court had ruled against his challenge for cause, was an abandonment by the prisoner of his right of complaint for the improper disallowance of his first challenge. I think it remained still open to him to review the decision in error, as it would have been manifestly his right to have done if his whole twenty challenges had been involved in the decision. This whole matter appears of record, and as I think rightly appears there, and it is just as much a subject of appeal as a plea in abatement over-ruled would have been although the prisoner afterwards pleaded in bar—*O'Brien v. The Queen* (2 H. L. Cas. 465); *O'Connell v. The Queen* (7 Ir. L. R. 266; 11 Cl. & F. 155). So a challenge to the array over-ruled would also be a ground of error, if the party did not afterwards challenge the polls—*O'Connell v. The Queen* (11 Cl. & F. 155); and I think it would be equally open to an appeal although he did challenge the polls. See *Freeman v. The People* (4 Denio 9).

I think, therefore, the challenge of Sparks for favor was still a ground of error, although the prisoner did afterwards challenge him peremptorily; and therefore I do not quite agree with the decisions in 8 English's Re-



ports, and in 4 Denio, above mentioned, as they force the argument to the extreme length, that to save the prisoner's rights he must put himself solely upon the validity or invalidity of the judgment pronounced against him, which is to make the prisoner submit, it may be, to a partial or corrupt jury, and to stake his life on a mere by-question, and not on the merits or justice of his cause.

But then it must appear that the prisoner was still relying on his rights, by protest or otherwise. At any rate it must not appear that he had waived or compromised them. Whether the allegation that the prisoner had taken and treated the juror as challenged peremptorily by him, and on his own behalf, shews the prisoner did waive his rights, may admit of some doubt; but I am inclined to think it does. In such a case there should be no doubt what the conduct and intention of the prisoner are. There should be no submission in deference to the judgment of the Court, nor should there be any taking and treating of the juror as one who has been peremptorily challenged, when it is not meant that he should be so taken and treated.

There should be a plain enunciation that what the prisoner does is not only not done with his consent, but is done expressly against it, and in full reliance on his rights of disputing and contesting the judgment which he temporarily submits to. Then the Crown is fully informed and warned of the nature and effect of the prisoner's proceedings, and is enabled to determine how far and in what manner to meet them, or to obviate their adverse operation.

The contrast between the procedure of the prisoner in this case and of the prisoner Mansell, in 8 E. & B. 62, in this respect, is very great. There Mansell, by his counsel, "protesting that the said jury has been elected contrary to the laws of this realm, and that, in default of our said Lady the Queen assigning good cause of challenge against the said W. Iremonger, the said Jabez Philpott, and the said several other persons, so ordered to stand by as aforesaid, the said jury ought not to be so sworn as aforesaid;" so that there was no misapprehending what it was Mansell was doing, and meant to do.



But in the present case there is even more than this which was calculated to mislead the Crown as to any reservation by Whelan of the right to contest the challenge which had been disallowed, for it is stated not only that he himself took and treated this juror as challenged peremptorily by himself, but that he and the Attorney General both did so, and the juror was not thereupon sworn upon the jury. This shews a stronger acquiescence in and adoption of the judgment than if the statement had been that the prisoner had alone done so; and it certainly constitutes a waiver, for the reasons before given. The Attorney General had clearly no right or opportunity after that to challenge the juror, as he might have done if the prisoner had declined to do so in pursuance of the judgment of the Court.

It cannot be said that this is an improper conjecture as to what the Crown might have done, for the turn of the Crown to challenge had not then arrived; and there is a difference between what the prisoner should have done, with an opportunity of doing it, and what the Crown might have done, without the opportunity of doing it.

This kind of co-operative proceeding between the Attorney General and the prisoner, does not seem to me to leave the question with respect to the juror Jonathan Sparks open any longer for discussion.

That injustice has in fact been done cannot be, and has not been, suggested; and if a wrong in mere contemplation of law has been done to the prisoner, it is chargeable upon himself, from the course which he has pursued, and not upon the Crown. And I must add that I cannot consider without alarm the idea of a prisoner who has been acquitted being subjected to a second trial because a challenge for the Crown had been erroneously overruled, when the counsel for the Crown and the prisoner had both taken the juror as challenged peremptorily by the Crown. Yet the same measure of justice must be meted out against the prisoner on behalf of the Crown, as against the Crown on behalf of the prisoner.

In my opinion, upon a consideration of all the facts of

the case, the prisoner has waived and lost his right of appeal against the decision of the Chief Justice in respect of the juror whose challenge was overruled; and therefore the ground thirdly assigned for error fails.

The fourth assignment, depending as it does wholly on the third cause, the two together forming the complete ground of error, falls, necessarily, with the third ground.

Upon the whole record, therefore, I am of opinion there is no error, and that judgment should be given for the Crown.

MORRISON, J.—I have the misfortune to entertain a different opinion from that held by the other members of the Court upon one of the principal questions arising in this case, and it is with great respect and diffidence that I venture to dissent from their judgment. As the conclusion I have arrived at cannot affect the decision of the Court, I should have preferred merely stating my dissent, were it not that in a matter of this nature the prisoner as well as the Crown are entitled to know the grounds upon which I rest my judgment.

With regard to the first two grounds of error assigned—namely, that it does not appear on the record that the learned Chief Justice held the session of Oyer and Terminer and General Gaol Delivery, &c., by virtue of any Commission, &c., and that no jury process is awarded, or could be legally awarded, &c.—I do not think it necessary that I should add anything to what has already been said by my brother Wilson, and what I am aware will be expressed by the learned Chief Justice, but to say that I entirely concur in their judgments in that respect.

Then, as to the last two grounds of error assigned, and the questions arising out of them, and upon which I am obliged to differ, I shall first briefly refer to the facts set out in the record.

It appears from the record that after seven jurors had been elected and sworn, twelve having been previously peremptorily challenged by the prisoner and thirteen

ordered to stand aside by the Crown, Jonathan Sparks was called. The prisoner challenged this juror for cause, alleging that Sparks had said that if he were on the prisoner's jury he would hang him; to which the Crown objected, that the prisoner was not entitled to challenge for favor, as he, the prisoner, had not exhausted his twenty peremptory challenges, only twelve then being so challenged by him. To this the prisoner demurred. The demurrer was argued, and the learned Chief Justice gave judgment, deciding that the prisoner was not then entitled to challenge the juror Sparks for cause, stating that the prisoner's challenge was good as a peremptory challenge, and not as a challenge for cause, and that if the prisoner's peremptory challenges of twenty, including the juror Sparks, were exhausted, the challenge to Sparks was to be considered as a peremptory challenge, and not for cause; and the record proceeds with this statement, "and thereupon, in deference to the said judgment, the said challenge is accordingly taken and treated by the said Patrick James Whelan and the said Attorney General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury."

What the parties meant by this latter statement did not appear very clear to me on the argument. I can only take it as meaning this:—that as the learned Chief Justice by his ruling deprived the prisoner of the means of shewing the unindifference of Sparks on his challenge for cause, the prisoner was compelled either to permit Sparks to be sworn on the jury, or to exclude him by using one of his peremptory challenges, and that the prisoner chose the latter course.

The fourth ground of error is only important as being involved in the third, and as depending upon the correctness of the ruling of the Chief Justice upon the challenge to the juror Sparks. It appears that Hodgins, a juror, on being called was peremptorily challenged by the prisoner. The Crown thereupon objected, and contended that, in-

cluding Sparks, the prisoner had then exhausted his twenty peremptory challenges. The prisoner claimed his right to challenge Hodgins peremptorily, as he had, according to his contention, in effect only challenged nineteen. The Court overruled the challenge, holding that, including the peremptory challenge of Sparks, the prisoner had exhausted his peremptory challenges; and Hodgins was sworn on the jury.

The law has ever had a watchful eye to the pure and impartial administration of criminal justice. Every safeguard has been thrown around that one best guarantee of our liberties, trial by jury, and it is of pre-eminent importance that this portion of the machinery of our judicial tribunals should be maintained in its integrity, and that we should, under no circumstances, by a departure from the due course of procedure, restrict or abridge those rights which were given to secure protection to the fair administration of our criminal law. The common law of England, and the statute law from the earliest period of our national history, gave to prisoners, for the purpose of securing to them impartial juries, various rights of challenge, in certain cases, to the whole panel or array, and also challenges for cause to individual jurors, "without stint." In addition to all this a prisoner was allowed, *in favorem vitæ*, an arbitrary and capricious species of challenge, called a peremptory challenge, to a definite number of jurors at his mere will and pleasure, and upon his own dislike, and without shewing any cause at all, and which right was limited by the Statute 32 Henry VIII. chap. 14, to twenty in felony:—"A provision" (as Blackstone says, in his Commentaries, Vol. IV. p. 353) "full of that tenderness and humanity to prisoners for which our English laws are justly famous. This," he says, "is grounded on two reasons. 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him;



the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

Under our jury laws, in cases of murder and felony, the number of peremptory challenges is limited to twenty, as in the Statute of Henry VIII. Before that Statute, at common law a prisoner could have challenged thirty-five in all cases peremptorily, which number in cases of treason he is still entitled to challenge.

Such being the law, at what time and in what order is a prisoner to make challenge peremptorily and for cause? The highest authorities, such as Coke, Blackstone, and others, and the practice in numerous cases, shew clearly to my mind, irrespective of the reason of the thing itself, that a prisoner is entitled to challenge for cause any juror who may appear at any time before a full jury is sworn, and either before or after the prisoner has exhausted any or all of his peremptory challenges. It is unnecessary for me to refer to authorities. Many were cited in the argument, and the quotation I have already made from Blackstone indicates the law and the practice, and the reason for it.

I must, therefore, with the utmost respect, say that in my opinion the learned Chief Justice erred in giving effect to the objection taken by the Crown against the prisoner's challenge for cause to the juror Sparks.

The next question to be considered is, whether the matters spread out on this record are subjects properly examinable in error. I confess at first I had some difficulty in arriving at a satisfactory conclusion on this point; but after an examination of the authorities to which we were referred, and some others I had occasion to look at, it seemed to me that were the prisoner debarred the right of having



these matters reviewed in a proceeding of this nature, he would be without remedy.

In the case of *Mansell v. The Queen*, (8 E. & B. 85), in the Exchequer Chamber, in error from the Queen's Bench, where the matters assigned as error also arose out of challenges to jurors, and which were over-ruled at the trial, not on demurrer, but merely after debate, nevertheless they appeared on the record. The Judges who heard the case in the Exchequer Chambers expressed great doubts that the questions so raised and the errors so assigned were properly on the record and examinable in error. No judgment was however given on that point, as the Court was in a position to decide the case on the merits: but I take from what fell from Willes, J., and Baron Watson, that if the case had been one in which the points raised had been overruled on demurrer error would lie.

*Gray v. The Queen*, in the House of Lords, (11 C. & F. 427), and *Rex v. City of Worcester*, (Skinner 101), were referred to, and I further note that Welsby, who was for the Crown, conceded, *arguendo*, that if a challenge made without cause is demurred to, or if there is a counter plea, the decision is one on which error may be brought.

I am therefore of opinion that the grounds taken here are properly the subject of error.

The next question that presents itself is, whether the prisoner, by exercising his right in peremptorily challenging Sparks under the circumstances stated on this record, and excluding the juror from the panel, has waived the effect of the erroneous ruling, and by electing to take that step has disabled himself, after trial, from taking advantage of the error complained of.

After carefully considering all the cases cited to us, and others to which my attention was directed, I have failed to find authority to guide me to a satisfactory conclusion one way or the other; and upon this part of the case, as my opinion is in conflict with the majority of the Court, I express it with a good deal of hesitation.

We were referred on the argument, by the counsel on

both sides, to a number of reported decisions in the Courts of the United States, where questions of a very similar character are discussed, reviewed, and judicially decided. In the neighbouring republic a greater latitude and facility is allowed to prisoners, by the laws of the various States, than in England or in this country, enabling prisoners there to bring under review in the Courts of the United States exceptions by way of error and appeal; and this may account in a great measure for our finding in their reports so many cases of a like character to the one before us. But these decisions are not uniform or consistent, either with respect to the practice in such cases or the principles upon which they are decided; and although such decisions are not authoritatively binding on us, yet being the judgment of able and learned Judges, expounding laws based on principles derived from our own as well as the decisions of English Courts, they are entitled to every respect and great weight, and I have found them on many occasions very instructive and valuable. But, unfortunately, the decisions cited to us as applicable to the question under discussion, are, as I have remarked, not uniform, but very diverse.

In the case of *The People v. Bodine*, in the Supreme Court of the State of New York (1 Denio 310), the Court said: "In no case is the prisoner bound to resort to his right to make peremptory challenges. It is armour which he may wear or decline at his pleasure. It is for his own exclusive consideration and decision, and the Court has no right to interfere with his determination. Nor should the prisoner's refusal to make use of her peremptory challenges, as she might have done, preclude her from raising objections to what was done by the Judge; and if, in truth, errors were committed, I do not see that it is less our duty to correct them, than it would have been if the prisoner had exhausted her peremptory challenges. The use or disuse of that right I regard as a fact wholly immaterial to the question now before the Court, and one which cannot rightfully exert the slightest influence upon the decision to be made."

While in the case of *Freeman v. The People*, (4 Denio, 31), the Court said: "It is now urged that these exceptions are still open to examination and review in this Court. I think otherwise. The prisoner had the power and the right to use his peremptory challenges as he pleased, and the Court cannot judicially know for what cause or with what design he resorted to them. He was free to use or not use them, as he thought proper; but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make his peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude those jurors, and thus virtually, and, as I think, effectually blotted out all such errors, if any, as had previously occurred in regard to them."

Again, in the case of *Dowdy v. The Commonwealth*, in the Court of Appeals of Virginia, (9 Grattan, 737), the Court decided, as in *Lithgow's* case, (2 Virginia Cases, 297), that if the Court erroneously over-rule a prisoner's challenge to a juror for favor, and then the prisoner peremptorily challenges the juror, the error of the Court is not cured by the subsequent exclusion of the juror, although the prisoner had not exhausted his peremptory challenges even to the last.

In the case of *McGowan v. The State of Tennessee* (9 Yerger's Reports, 184), the Court held that the state-ment did not shew that the prisoner had exhausted his peremptory challenges, and if he did not, and he elected a jury *omni exceptione majores*, leaving the peremptory challenges unexhausted, they were of opinion that it did not constitute an error for which they ought to reverse the judgment. And the case of *Stewart v. The State* (13 Arkansas, and 8 English's, Reports, 720), was decided in accordance with the case in 9 Yerger; the case of *Bodine* was also referred to. In that case the prisoner complained that he was compelled to exhaust three of his peremptory challenges by the erroneous ruling of the Court; and it is held that if a prisoner challenge a juror when he is not

obliged to do so, he waives his exception, and cannot avail himself in error of the exception then abandoned, and this although he may exhaust his peremptory challenges.

Such are the results of the principal decisions in the United States Courts ; and after the most anxious and the best consideration I have been able to give to the subject, I cannot arrive at the conclusion that the course adopted by the prisoner was, on his part, either a waiver or abandonment of his right now to except to and complain of the ruling of the learned Chief Justice.

It would be, in my judgment, contrary to the whole spirit of our criminal law to hold that when a prisoner is compelled, on his trial for a capital felony, to submit to the ruling of a Judge, and the denial of a right in a matter of vital importance, and when, in order to avoid the immediate consequence of the erroneous judgment, he resorts to the use of another right given to him by the humanity of our law in *favorem vitæ*, a right to be retained by the prisoner in anticipation and used by him at his will, if circumstances should arise to provoke its exercise—I say I cannot assent to holding in such a case that the prisoner should be considered to have waived the wrong to which he excepted and had thus to submit to and avoid. A *multo fortiori* when the consequential operation of the erroneous ruling in effect deprived him of the right of excluding another juror whom he challenged, and who was sworn on his jury. In my opinion his submission to the ruling of the Court as it appears on the record was done *salvo jure*, and that it is open to the prisoner to urge the exception he has taken with a view to a *venire de novo*.

It was very ably and ingeniously argued that the course adopted by the prisoner was solely one of his own choice and selection, and that by the step he took he effected what he desired to do by his challenges to the favor, namely, the exclusion of the juror Sparks from the jury ; and that by resorting to his peremptory challenge he was not in any wise prejudiced by the erroneous ruling ; and that he is now estopped, or ought not to be permitted to complain after so



electing and taking the chances of an acquittal by a jury composed of jurors each of whom stood *omni exceptione major*.

But in my judgment the question is not one whether the prisoner was actually prejudiced at his trial. If that were the ground on which we were called on to decide, there would be only one opinion, and that no injury resulted to the prisoner by the ruling of the learned Chief Justice, or the course adopted by the prisoner ; nor was it suggested on the argument that there was any the slightest ground to doubt that the prisoner had an impartial jury and a fair trial, aided as he was by the ablest counsel at the bar. On that score we are relieved from any anxiety. The question is one of strict legal right. It is not for this Court to conjecture what effect, if any, the overruling of the prisoner's challenge for favor to Sparks had on either the composition of the jury or the trial itself, for the question is not the fairness of the trial, but whether the prisoner was deprived of an important right which he invoked, and to which he was legally entitled ; and if there is any right more important than another on a trial to a prisoner on his life or death, it is the right to exclude from his jury any juror who is not indifferent, and against whom he is able to shew good cause, or the right to set aside any one against whom he has conceived a dislike.

I cannot concur in the view pressed on us by Mr. Robinson for the Crown : that if the prisoner had declined to challenge Sparks peremptorily, and that juror was sworn on the jury, the prisoner would have been entitled in that case to take advantage of the incorrect ruling of the Judge ; but that having chosen by his own voluntary act to exclude Sparks, he did, as said in the case of *Freeman v. The People*, reported in 4 Denio, virtually and effectually blot out the error that occurred in respect to that juror : that having resorted to the use of his peremptory challenge, the consequence of that act must be followed to all its legitimate consequences. I cannot see the force of this reasoning. If the prisoner, submitting to the erroneous decision, declined to



peremptorily challenge Sparks, it might have been argued, and I think with much force, that the prisoner acquiesced in the juror being elected and sworn, and that the maxim "*qui non prohibet quod prohibere potest assentire videtur*" might be invoked against him, as having the power to exclude Sparks he did not use it.

I cannot see the distinction between what was pressed on us during the argument as indicating, in this case, on the part of the prisoner, a waiver or election, and what I understand as being meant by consenting; and in the absence of authority which I would be bound to follow, I am not disposed to do anything that may disturb, or narrow, or fine away that well-known principle in our criminal law, and which is referred to by Sir John Coleridge in giving judgment in the Privy Council, in *Regina v. Bertrand* (L. R., 1 P. C. 534), as "the wisdom of the common understanding in the profession, that a prisoner can consent to nothing."

I am therefore of opinion—as it appears that the prisoner, through the erroneous judgment of the Court, was deprived of his right of challenge for favor to and of proving the alleged unindifference of the juror Sparks, and that in consequence thereof, and in order to avoid the effect of the improper ruling, the prisoner had to resort to a peremptory challenge to exclude Sparks from his jury, and so *pro tanto* to diminish his peremptory challenges, and as he was afterwards disallowed his peremptory challenge to the juror Hodgins, on account of the juror Sparks being so excluded—that the prisoner is entitled to our judgment, and that a *venire de novo* should be awarded.

**RICHARDS, C. J.**—As to the two first grounds of error assigned on behalf of the prisoner :

That it is not alleged on the record that the presiding Judge held the said session of Oyer and Terminer and General Gaol Delivery by virtue of any commission to him, or to him and others, granted for that purpose, or without any commission by the order, command or direc-

tion of the Governor General of the Dominion of Canada, or of the Lieutenant Governor of the Province of Ontario.

Under the Provincial Statute of Upper Canada, 2 Geo. IV. ch. 1, sec. 27, it was provided that it should and might be lawful for the Governor to issue yearly and every year in the vacation between Michaelmas and Trinity Terms, such commissions of Assize and Nisi Prius into the several districts, as might be necessary for trying all issues joined in the court in any suit or action arising in the said districts respectively; and when suitable communication by land should be opened, and the circumstances of the Province might require it, likewise to issue such commissions in the vacation between Hilary and Easter Terms.

This section was repealed by the same Parliament, by 7 Wm. IV. ch. 1, sec. 8, which provides in similar language for the issue of Commissions of Assize and Nisi Prius unto the several districts of the Province in the vacation between Easter and Trinity Terms, and between Michaelmas and Hilary Terms. The section then proceeds: "And that in like manner Commissions of Oyer and Terminer and General Gaol Delivery shall be issued unto the several districts of this Province twice in the year, within the periods aforesaid." There is also a proviso to the section authorising the Governor to issue a special commission, or special commissions, for the trial of one or more offender or offenders, upon extraordinary occasions, when he shall deem it requisite or expedient so to do.

By Statute of Canada, 8 Vic. ch. 14, sec. 1, it was provided that it should not be necessary for the Governor to issue commissions of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, more than once in the year into certain districts therein named. This section was repealed by the Statute of Canada, 12 Vic. ch. 63, sec. 18, sec. 20 of which in effect re-enacted the same provisions as are contained in 7 Wm. IV. ch. 1, sec. 8, except the commissions were to issue in the vacation between Hilary and Easter and Trinity and Michaelmas Terms.

By Statute of Canada 18 Vic. ch. 92, sec. 43, it was

provided that "It shall not be necessary to issue any Commission of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery for any county or place in Upper Canada, but the said Courts shall be held at such times as the Judges of the superior Courts of Common Law shall appoint subsequent to the several terms after which they are now directed by law to be holden. \* \* \* And the Judges of the several superior Courts of Common Law in Upper Canada shall and may preside over the Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery, in the same manner and with the same authorities and powers, without the issuing of any commission or commissions for the holding of the said Courts as they have been accustomed to do under commission before the passing of this Act." Then a proviso similar to that referred to in the other statutes, authorising the issuing any special commission for the trial of offenders, in the same manner and with the same authorities and powers as if that section of the Act had not been passed.

The next section refers to the sending to the Judges of the superior courts of common law the names of those who shall be associated with the Judges of the said courts as *Justices of the said Courts of Assize and Nisi Prius*, Oyer and Terminer and General Gaol Delivery, for the several counties where such Courts are to be holden.

Section 45 provides, that any Queen's Counsel may be an associate Justice for the despatch of civil or criminal business at any county or on any circuit in Upper Canada, and any such person shall and may be and act as a Judge of such courts, in the absence of any Judge of the superior Courts of Common Law, as fully as if he were duly commissioned as one of Her Majesty's Judges of the said superior Courts of Common Law.

By the Common Law Procedure Act of 1856, Statutes of Canada, 19 Vic. ch. 43, sec. 318, the 20th sec. of 12 Vic. ch. 63, and the 43rd, 44th, and 45th sections of 18 Vic. ch. 92, were repealed; and by section 152 of the same Act it was provided that "Courts of Assize and Nisi Prius

of Oyer and Terminer and of General Gaol Delivery, shall be held in every County or Union of Counties in Upper Canada (except in that within which the city of Toronto is situate) in each and every year, in the vacations between Hilary and Easter Terms and between Trinity and Michaelmas Terms, with or without commissions as to the Governor of this Province shall seem best, and on such days as the Chief Justices and Judges of the superior Courts of Common Law in Upper Canada shall respectively name; and if commissions are issued, then such Courts shall be presided over by the persons named in such commissions; but if no such commissions are issued, then the Courts of Assize and Nisi Prius shall be presided over by one of the Chief Justices or of the Judges of the said superior Courts of Common Law, or in their absence then by some one of Her Majesty's Counsel learned in the law and of the Upper Canada Bar, who may be requested by any one of the said Chief Justices or Judges to attend for that purpose, or by some one Judge of a County Court who may be so requested; and the Courts of Oyer and Terminer and General Gaol Delivery shall be presided over by either of the said Chief Justices or Judges, or by any such of Her Majesty's Counsel or any such Judge of a County Court, each and every of whom shall be deemed to be of the quorum, together with any one or more of the persons who shall be named as associate Justices of the said Courts of Oyer and Terminer and General Gaol Delivery; and the said Chief Justices and Judges, and such of Her Majesty's Counsel as aforesaid, and such Judge of a County Court presiding at any Court of Assize and Nisi Prius, shall and may possess and exercise the like powers and authorities as have been usually expressed and granted in commissions issued for the holding of such Courts; and the said Chief Justices and Judges and such of Her Majesty's Counsel as aforesaid, and such Judge of a County Court presiding at any Court of Oyer and Terminer and General Gaol Delivery, and the person or persons named as Associate Justices, shall and may possess



and exercise the like powers and authorities as have been usually expressed and granted in and by commissions issued for holding such last mentioned Courts, and wherein such Chief Justices and Judges and Queen's Counsel and Judges of County Courts would have been named of the *quorum*."

Provision is then made for the holding of these Courts three times a-year in the City of Toronto, and the times of holding the same are named, with the proviso that special commissions may issue for the trial of any offenders.

Sec. 153 makes provision similar to that contained in sec. 44 of 18 Vic. cap. 92, as to Associates, but limiting the number of such Associates to five for any one Court of Oyer and Terminer and General Gaol Delivery; and the Clerk of Assize is made *ex officio* one of the Associate Justices.

The Common Law Procedure Act of 1857, 20 Vic. ch. 57, sec. 30 (Canada) repealed secs. 152 and 153 of 19 Vic. ch. 43, and substituted a new section for it similar in terms except that it provided that it should not be necessary to name any Associate Justices in any Commissions of Oyer and Terminer and General Gaol Delivery that might be issued, or that any Associate Justices should be nominated, or attend, or be present, at any Court of Oyer and Terminer and General Gaol Delivery to be held after the last day of Trinity Term, 1856. Then comes the usual proviso, that nothing therein contained shall restrict the Governor from issuing special commissions for the trial of any offender.

Those parts of the Consolidated Statute of Upper Canada, ch. 11, as amended by ch. 40, sec. 3, of the Statutes of Canada, 29-30 Vic., which were in force at the time of the trial of the indictment referred to, and which it is necessary to refer to, are as follows:—

Consol. Stat. U. C. ch. 11, sec. 1, (as amended by 29-30 Vic. ch. 40, sec. 3.) "The Courts of Assizes and Nisi Prius, and of Oyer and Terminer and General Gaol Delivery, shall be held in every county or union



of counties in Upper Canada in each and every year in the vacations between Hilary and Easter Terms, and between that period of the vacation after the twenty-first day of August and Michaelmas Terms; and in addition to the said two Courts to be held for the County of the City of Toronto and the County of York, there shall be held a third such Court in every year in each of the last two mentioned counties in the vacation between Michaelmas and Hilary Terms; and all such Courts shall be held, with or without commission, as to the Governor may seem best, and on such days as the Chief Justices and Judges of the Superior Courts of Common Law shall respectively name."

Sec. 2. "In case commissions be issued, such commissions shall always contain the names of the Chief Justices and Judges aforesaid, one of whom, if any one of them be present, shall preside in the said Courts respectively, and such commissions may also contain the names of any of the Judges of the County Courts, and of any of Her Majesty's Counsel learned in the Law of the Upper Canada Bar, one of whom shall preside in the absence of the Chief Justices and of all the other Judges of the said Superior Courts."

Sec. 3. "If no such commissions be issued, the said Courts shall be presided over by one of the Chief Justices, or of the Judges of the said Superior Courts, or in their absence, then by some one Judge of a County Court, or by some one of Her Majesty's Counsel learned in the Law, of the Upper Canada Bar, upon such Judge or Counsel being requested by any one of the said Chief Justices or Judges of such Superior Courts to attend for that purpose."

Sec. 4. "Each of the said Chief Justices and Judges and of such Judges of the County Court and of such Counsel learned in the Law, presiding at any Court of Assize and Nisi Prius, or of Oyer and Terminer and General Gaol Delivery, shall possess, exercise and enjoy all and every the like powers and authorities heretofore set forth and granted in commissions issued for holding all or any of the said Courts."

Sec. 5. "It shall not be necessary to name any associate Justices in any commissions of Oyer and Terminer and General Gaol Delivery, or that any Associate Justices should be nominated to, or attend, or be present, at any Court of Oyer and Terminer and General Gaol Delivery."

Sec. 6. "The Governor may issue special commissions of Oyer and Terminer or of Gaol Delivery for the trial of offenders, whenever he deems it expedient."

The argument of the learned Counsel for the prisoner, as I understand it, is that it is necessary that the Governor, under the provision of the Statute already referred to, should decide, as an affirmative proposition, whether the Courts referred to shall be held with or without commission: that this decision should be made before the Courts are held, and should be made known by some instrument under the great seal; and that the caption to the indictment should shew how the Courts were held, whether under commission or that the Governor had decided they should be held without commissions.

The Courts, as I understand the Statute, are not held by virtue of the commission, but by the provisions of the Act itself. By it the Courts shall be held in the vacations there specified, and on such days as the Judges shall name.

The issuing of the commission does not make the least difference as to how or when these Courts fixed by the Judges under the law are to be held, or who or which of the Judges of the Superior Courts of Common Law are to preside over them. If the Courts were presided over by a County Judge or Queen's Counsel, it might perhaps be necessary to state in the caption of the indictment how the Court was held, whether under the authority of a commission or not. If under the authority of a commission, then of course only the County Judge and Queen's Counsel named therein could, in the absence of the Judges of the Superior Courts referred to, hold such Courts and; it might be necessary to shew how that was, as well as in the event of the Court being held without commission, for the pre-

siding Judge or Queen's Counsel in that case could only hold them on the request of one of the Judges of the Superior Courts, which it might be necessary to shew was done. But in any event, if the Courts could be held at all they were presided over by the Judge who the Statute requires should hold them, and who derives his authority from the Statute.

The argument of the prisoner's counsel being that the Crown can only act by matter of record, under seal, I take it for granted that "if it seemed best" to the Governor that the Courts should be held under commission, the only evidence of such conclusion which could properly be given would be the commission itself. In the absence of such commission it seems to me that he most effectually decided that "it was best" that no commission should issue to hold the Courts. The authority to hold the Court in the first section of the Statute then arises at once, and becomes complete under the third section, which says "If no such commission be issued, the said Courts shall be presided over by one of the Chief Justices," &c.

In my opinion the recital in the caption of the indictment, that at a general session of Oyer and Terminer and General Gaol Delivery, for the county named, holden before the Chief Justice of the Court of Common Pleas, a Justice of Our Lady the Queen, duly assigned and under and by virtue of the Statute in that behalf duly authorized and empowered to enquire, &c., sufficiently shews a holding of the Courts without commission. If there had been a commission it would and ought to have been recited, and there being no commission the Court, as I have already said, in my judgment was properly held without it.

The record itself states that the Judge was under and by virtue of the Statute in that behalf duly authorized to inquire by the oaths, &c., of lawful men; and at such Court of Oyer and Terminer and Gaol delivery it was presented that the prisoner did murder one Thomas D'Arcy McGee. It is further recited that at the same session of Oyer and Terminer and General Gaol Delivery, held before

the said Judge (naming him), came the said prisoner in custody of the Sheriff and pleaded not guilty to the said indictment, on which issue being joined, "therefore let a jury thereupon immediately come before" the said Judge (naming him), of good and lawful men by whom the truth of the matter may be better known, and who are, &c., to recognize, &c., because as well, &c. Then the return of the panel is recited.

But suppose there is any defect or omission in setting out in the caption in a proper manner the authority of the Judge or Court to take the particular proceedings necessary in this matter, I still think, if this Court, having knowledge of its own practice and proceedings, and of those of other Superior Courts under our own Statutes, are satisfied the Court was duly held, we may reject the caption altogether, under the provision of sec. 52, of Consol. Stat. C. ch. 99, which declares that "In making up the record of any conviction or acquittal on any indictment, it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading, and the statement of the arraignment, and the proceedings subsequent thereto, shall be entered of record in the same manner as before the passing of this Act," (subject to alterations to be made by any rule or rules of Court.)

On this first question, I cannot say that I have any doubt that the Court in question was properly held under the authority of the Statute, whether a commission issued or not. If it issued, the Statute gave authority to the Judge who presided to hold the Courts of Oyer and Terminer and General Gaol Delivery referred to; and if it did not issue, the Statute equally gave authority to the same Judge to hold the Court, and in my judgment it was equally shewn that it seemed best to the Governor that the Court should be held without commission.

The second ground of error is, that no jury process is awarded upon the said record, nor could such process be legally awarded by the said William Buell Richards, as such Chief Justice, inasmuch as, for the reason firstly above



assigned, he had no jurisdiction or authority to award such process as a Justice of Oyer and Terminer and General Gaol Delivery for the said County of Carleton.

By the Jury Act, Consol. Stat. U. C. ch. 31, sec. 59, "The Judges, Justices, and others to whom the holding of any sittings or sessions of Assize and Nisi Prius, Oyer and Terminer, Gaol Delivery, Sessions of the Peace, or County Court, by law belongs, or some one or more of such Judges, Justices or others, shall for that purpose issue precepts to the Sheriff or other proper officer or minister for the return of a competent number of Grand Jurors for cases criminal for such sittings or sessions, and of a competent number of Petit Jurors for the trial of such issues or other matters of fact, in cases criminal and civil, as it may be competent to such Petit Juries to try at such sittings or sessions according to law."

Section 60.—"The several precepts for the return of panels of Grand and Petit Jurors for any sittings or sessions of Assize and Nisi Prius, Oyer and Terminer, Gaol Delivery, Sessions of the Peace, or County Court, shall be issued to the Sheriff or other officer or minister to whom the return of such precept belongs, *as soon as conveniently may be after the commission, or other day is known upon which the jurors to be returned upon such precepts are to be summoned to attend*, and where such day is fixed by law, then as soon as conveniently may be after the close of the last preceding sittings or sessions of the like Court."

Section 63 continues the same power and authority to the Superior Courts of Common Law at Toronto, and all Courts of Oyer and Terminer and General Gaol Delivery in Upper Canada, as theretofore, "in issuing any writ or precept, or in making any award or order orally or otherwise for the return of a jury for the trial of any issue before any of such Courts respectively, or for the amending or enlarging the panel of jurors returned for the trial of any such issue; and the return to any such writ, precept, award or order, shall be made in the manner heretofore used and accustomed in such Courts." &c.



Section 72. "For the trial of issues in cases whether criminal or civil, which come on in course for trial at any sittings or sessions of Assize and Nisi Prius, Oyer and Terminer, Gaol Delivery, Sessions of the Peace, or County Court, it shall not be necessary to sue out any writ of *Venire Facias Juratores* or other jury process, but the award of such process by the Court, and the entry of such award where necessary on the roll, together with the return of a panel of jurors upon the general precept issued for such sittings or sessions, and the trial of such issues respectively by a jury taken from such general panel in the manner herein provided, shall be sufficient, and shall be as valid and effectual in law as if such *Venire Facias Juratores*, or other process, had been actually and regularly sued out in each case, and the names of the jurors had been regularly returned upon such jury process."

Section 74, among other things, provides that nothing in the Act "shall alter, abridge or affect any power or authority, which any Court or Judge hath when this Act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in those cases only where any such power or authority, practice or form, is repealed or altered, or is inconsistent with any of the provisions hereof."

As to the recital in the caption of the indictment not stating in express words that the Judge therein named was assigned to deliver the gaol of the county of the prisoners therein, I have already remarked that under the Statute no caption is necessary; and if it had simply stated that at the sitting of the Court of Oyer and Terminer and General Gaol Delivery of our Lady the Queen, held before the Judge of the Superior Court therein named, on the day named, it was presented in manner and form as followeth, and then continued as in the record sent up, it seems to me, under the Statute, that would be all that is necessary.

The early Statute which I have referred to, of Upper Canada, 7 Wm. IV., ch. 1, sec. 8, says commissions of Oyer and Terminer and General Gaol Delivery *shall* be

issued twice a year into the several districts of the Province; and the same provision being continued down to the latest enactments on the subject, contained in the Consolidated Statutes of Upper Canada as amended, which I have extracted, all shew that in these general sittings of the Court of Oyer and Terminer the General Gaol Delivery sat with it. In practice, I believe, from a very early period of our judicial history, as far as Upper Canada is concerned, Judges and Justices of Oyer and Terminer and General Gaol Delivery were named in the same commission, which conferred all the powers for holding both these Courts. On directing search in the Crown office, these commissions in that form seem to have been universally used in Upper Canada since 1818, for the general sittings of those Courts, and we have seen a precept filed in the Crown office, reciting a commission of a similar character of an earlier date.

The Commission of Assize and Nisi Prius was a separate one, all the Courts being in fact held under these two commissions.

It further appears that the form of caption and record in the criminal cases in use in the Crown office here, where these records in criminal cases have always been made up in this country, has been that used in the present case.

In practice, I should infer that in this country the course pursued is similar to that in England. A precept signed by the Judges, who are always named in both commissions, goes to the Sheriff, to return a general panel of jurors, and that precept is returned into Court on the first day of the Assizes with the panel, and from the names contained in that panel all the juries, both on the civil and criminal side of the Court, are taken; and as the criminal Court always possesses the powers of Oyer and Terminer and General Gaol Delivery, the jury process awarded in that Court is entered on the rolls, "therefore let a jury thereupon immediately come."

In *Hawk. P. C.* Book 2, ch. 41, sec. 1, it is said that

Justices of Gaol Delivery may have a panel returned without precept, for before their coming they always make a general precept, and therefore they need not make any other precept for the return of a jury, but their bare award "that the jury shall come" is sufficient, because there are enough for that purpose supposed to be present in Court, whom the Sheriff may return immediately. See also *Hale* P. C. Vol. II. pp. 28, 260, 261, 263, 410; *Chitty's* Crim. Law, Vol. I. p. 506; *Peter Cook's* Case, 13 State Trials, 326; *Hawk.* P. C., Book 2, ch. 5, secs. 21, 32.

The case of *Rex v. Royce*, referred to, (4 Burr. 2085), shews that it is not necessary to set out the Commission of Gaol Delivery in full.

The form used in making up this record, as far as the end of the judgment, is somewhat similar to that in the appendix to the fourth volume of Blackstone's Commentaries, though it there appears that the sittings of Oyer and Terminer and Gaol Delivery were at different times, yet the Commission of Oyer and Terminer seems to be fully recited, and then the indictment found before the justices of that Court is afterwards, on a day named, at the delivery of the gaol of the county, holden before the Judges named, and their fellows, Justices of the King assigned to deliver his gaol aforesaid of the prisoners therein, being, by their proper hands delivered in Court in due form of law to be determined; and afterwards, at the same delivery of the gaol of the said county, and before the same Justices above named, and others their fellows aforesaid, cometh the said prisoner in custody, &c.

We must, I presume, take judicial cognizance of the powers of a Court of General Gaol Delivery, and wherever it is recited in a record that anything was done at such a Court, if we find that such Courts have power to do the thing so recited to be done, we must hold it to be rightly done. I do not see how we can, against the record and the facts there stated, hold that a Court of General Gaol Delivery was not held as it purports; and if so held, then

their power to direct the jury to come, stated on the record, no doubt existed.

On the whole, I am of opinion that under our own Statutes in relation to the holding of these Courts, the Jury Act, the provision of the Statute respecting the caption of indictments, and the practice which has so long prevailed here, the record sufficiently sets forth the power of the Judge to hold the Court and award the jury process excepted to. And as far as I have been able to explore the present state of the law in England on the subject, I am not prepared to say that, independent of many of the provisions of our own Statutes, the proceedings objected to are not regular, and sufficiently shewn to be legal and properly authorized, as set forth in the record.

As to the third and fourth grounds of error—that the presiding Judge erroneously decided that the prisoner's challenge of the juror Sparks for cause should not be allowed, and erroneously refused his peremptory challenge of the juror Hodgins, because his peremptory challenges of twenty had been exhausted :

In *Sir William Parkyns'* case, 13 Howell's State Trials, p. 74, when Leonard Hancock's name was called, the defendant said "I except against him, he is the King's servant." The next juror was then called, and when Thomas Taylor's name was called, he said "I challenge him, he is the King's servant." He enquired (p. 75), "How many have I challenged?" *Clerk of Arraigns*—"Twenty-five." *Parkyns*—"But there are two that I gave reason for, as the King's servants." *Cl. of Ar.*—"You may speak to my Lord about it." *Lord Chief Justice Holt*, addressing the prisoner—"You have challenged two, and have assigned the cause of your challenge, that is, Hancock and another, and the reason of your challenge is, because they are the King's servants. I am to acquaint you, that is no cause of challenge; but, however, the King's Counsel do not intend to insist upon it, if there are enough besides. They are willing to go on with the panel; and I speak this because I would not have it go for a precedent. \* \*



However, they will not stand with you, if there be enough to serve."

On the trial of *Jeremiah Brandreth* for high treason in 1817 (reported in 32 State Trials), before Chief Baron Richards, with Mr. Justice (afterwards Chief Justice) Dallas, Mr. Justice Abbott, afterwards Lord Tenterden, and Mr. Justice Holroyd, all eminent Judges, Sir Samuel Shepherd was Attorney General, and Sir Robert Gifford Solicitor General. At p. 773 the Attorney General said, in argument, "I apprehend the right of peremptory challenge must be exercised first. \* \* \* I put it to your Lordships that that which I state most positively has never been questioned, and on reading the State Trials you will find that that which appears to have been always the practice is also founded on the principle, that the absolutely peremptory challenges must be made first, to leave those remaining upon the panel, about whose capacity to serve (when I say capacity to serve, I mean in consequence of any objection), questions may arise, to be made out by evidence on the part either of the prisoner or of the Crown."

The Chief Baron in giving his opinion said, "The prisoner is to declare his resolution first. It certainly is so in practice, about which, with the very small experience I have had, I can say I have no doubt, but others of the Court have had very large experience upon the subject, and I conceive it to be clear, that it is according to the practice of the Courts that the prisoner should first declare his resolution as to challenging. I think it is so upon principle also; he has his peremptory challenges, and then the rest of the jury lie in common between him and the Crown." Mr. Justice Holroyd said, "When a juror is called and presented to the Court, the first thing is, to ascertain whether he is a juror or not. The next thing to be enquired into is, whether either party has cause of challenge or not: I mean, after it is ascertained that he is a freeholder, and has those qualifications without which he cannot be sworn. The first step, therefore, is to ascertain whether he is to be sworn or not. \* \* \* If neither party challenge



him, and it is shewn that he is a person qualified to be a juror, the only requisite step that remains to be done is, that he shall be sworn."

I may use language in relation to this matter similar to that used by Baron Bramwell in *Mansell v. The Queen* (8 E. & B. 111). "Very little weight is to be attached to the opinion I formed at the Assizes; for the subject was new to me." I followed the practice which I had always understood to prevail in this country in relation to challenges, and the reasoning of the Attorney-General in Brandreth's case suggested itself to my mind. The only authority then at hand to refer to was *Archbold's Pleading and Evidence in Criminal Cases*, and in the last edition, the 16th, at page 149, I found it thus laid down:—"And the defendant, in treason or felony, may for cause shewn object to all or any of the jurors called, after exhausting his peremptory challenges of thirty-five or twenty."

When we look at the very eminent Judges who presided in Brandreth's case, and see that the late Lord Denman, then Mr. Denman, was one of the defendant's counsel, it seems strange that the broad language used by the Attorney General should not have been objected to, if his views were not then received as correct. It is true the discussion did not necessarily involve the question of exhausting the peremptory challenges first, but if the broad language used was considered open to objection, I should have thought some notice would have been taken of it.

In the head-note of the case of *The Queen v. Geach*, indicted for forgery, in 1840, (9 C. & P. 499), it is stated, "In a case of felony, after a prisoner has challenged twenty of the jurors peremptorily, he may still examine any other of the jurors (who are subsequently called) as to their qualification." The defendant in that case was an attorney, and he seems to have exhausted his peremptory challenges first, and then wished to know if he could examine the juror as to his qualification. He probably had the idea that while he had peremptory challenges he must use them.

I have no doubt but that at any time before a juror is sworn, he may be examined as to his qualification, whether before or after his peremptory challenges are exhausted, in order to ascertain whether he is a person qualified to be a juror. In the English cases to which we were referred in argument, I did not meet with any in which the challenge for favor was discussed to any extent before the peremptory challenges were exhausted. In one of the cases—*Cook's* case,—it was objected that the juror had made use of language similar to that set up as a cause of challenge against Sparks. Yet in that case, as the prisoner was not in a position to prove the alleged cause of challenge, and the juror was not bound to answer as to it on his *voir dire*, the challenge for cause was not in any way tried or proceeded with.

I have already quoted what was said in *Sir William Parkyns's* Case, as to the objection that two of the jurors were the King's servants; and in *Rex v. Stone* (6 T. R. 527) the juror was objected to as being ill-described, being described as of Grafton Street, when there were several streets of that name. On that being over-ruled he was challenged peremptorily.

There are several American cases where the jurors were challenged for favor, and on the challenge being decided against the prisoner he was allowed to challenge peremptorily immediately after.

I find, however, the doctrine expressly laid down by Lord Coke, in his first Institute, 158 *a*, in reference to when the challenge is to be taken. After going over different heads numerically, such as "*First*, he that hath divers challenges must take them all at once, and the law so requireth indifferent trials, as divers challenges are not accounted double." Then, after stating other heads, he comes to, "*Sixthly*, if a man in case of treason or felony challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily." And the conclusion is, "After one hath taken a challenge to the polle, he cannot challenge the array." There is no reference to

authority for the doctrine laid down *sixthly* by Lord Coke, but it is adopted and reasons given for it by Blackstone in the fourth volume of his Commentaries, the passage being quoted hereafter from the judgment of Judge Beardsley, in the case of *Bodine*.

It is also stated to the same effect in *Comyn's Digest* Challenge, C. 1, with a reference to *Co. Lit.* 158 *a*; and in *Hawkins*, P. C. Book 2, ch. 43, sec. 10; *Joy* on Confession and Challenges 186, quoting *Blackstone's Commentaries*; *Chitty's Crim. Law*, p. 545. *Dickinson*, Q. S. 489, quotes the language of Sir William Blackstone, in his commentaries, on the subject. *Burn's J.*, 29th ed., Jurors, sec. viii. 2, vol. iii. p. 968; *Brooke's Ab. Challenge*, 86, referring to 37 H. 6, 8.

Most of the American authorities, where the matter is referred to, affirm the same doctrine.

*Hooker v. State of Ohio* (4 Hammond, 348), decides that a prisoner may challenge for cause before his peremptory challenges are exhausted—quoting 4 *Black. Commentaries*, 363; *Wms. Jus.* 189; 4 *Harg. State Trials*, 738, 739, 740, 750; *Chitty Criminal Law*, vol. i. p. 545; *Bac. Ab.*, Jurors, E. 11; *Burn's Justice*, 4, 2; *Hawk*, P. C., Book 2, ch. 43, sect. 10; *Co. Lit.* 158; *Commonwealth v. Knapp*, 9 Pick 496.

In *Carnal v. The People* (1 Parker's Criminal Reports, of the State of New York, 272,) much of the law as to the order of the challenges is referred to, and the right of the prisoner to challenge peremptorily after a challenge for cause decided against him, is expressly recognized.

The cases in the 1st and 4th volumes of Denio's reports of the Supreme Court of the State of New York, shew that the peremptory challenges were used after challenges for cause had been decided against the prisoner, and so do most of the other American cases referred to, except in two cases in Massachusetts, *Commonwealth v. Webster* (5 *Cushing*, 295), and *Commonwealth v. Rogers* (7 *Metcalf*, 500). These cases however, were decided under a peculiar statute, and under it the courts held that the prisoner

must make his peremptory challenges before the jurors are interrogated by the Court as to their bias.

I have found in *Brunker's Digest*, p. 613, reference to an Irish case, which decides that a prisoner may challenge a juror peremptorily after a challenge to the juror *propter affectum* has been found against the prisoner by the triers.

After this array of authorities sustaining the views of Lord Coke, and the approval they have received from the other great legal writers and eminent compilers of the law, I think it must be conceded I was wrong in deciding, as I did at the Assizes, that the challenge by the prisoner of the juror Sparks could not then be received and tried as a challenge for cause at the time he took it. If I had said that the challenge for cause could be more conveniently disposed of after the peremptory challenges had been exhausted, perhaps under the views expressed by some of the Judges in *Mansell's* case, the ruling might have been sustained; but even then the advantage suggested by Blackstone, of the prisoner availing himself of the peremptory challenges to exclude a juror who might be unfriendly, on account of the challenge for cause having been made, could not be attained.

Looking, then, at the way in which the question of the over-ruling of the prisoner's challenge to the juror Sparks is put on the record, I think the writ of error is the proper way of bringing the matter before the Court. The cause of challenge and the decision thereon are reduced to writing, and the judgment of the Court is upon a matter not involving any question of fact, and they are all on the record.

The decision of the Court having been adverse to the prisoner, two courses were open to him. He could either decline challenging the juror peremptorily, and he would then have been sworn on the jury, or he could challenge him peremptorily, and exclude him from the jury. If he had gone upon the jury, and been sworn thereon, then the view we take of the law is that it would have been a mistrial, and on the matter being brought up on a writ of error the court would have directed a *venire de novo*.

It is suggested that the statement that, "in deference to



the said judgment, the said challenge is accordingly taken and treated by the said Patrick James Whelan and the said Attorney General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury," shews that Sparks was not challenged *peremptorily* by the prisoner.

It is not suggested that he was challenged by the Crown, or ordered to stand aside at the instance of the Crown. The challenge for cause was not tried, and the Court had decided that it could not then be received as a challenge for cause, but only as a peremptory challenge, and it was accordingly taken and treated as a peremptory challenge, and thereupon Sparks was not sworn on the jury. Surely he was not sworn because both the prisoner and the Crown treated the challenge as a peremptory one; and that in fact was the only way in which the juror could have been kept off the jury.

It seems to me that the natural conclusion from the statement—the Court decided against the prisoner's right then to challenge for cause, but held it might be good as a peremptory challenge, and if his peremptory challenges of twenty were exhausted that was to be considered as one of them—is, that as the Court would not accept it as a challenge for cause, the prisoner did what in fact the judgment of the Court compelled him to do, if he wished to exclude Sparks from the jury—viz., peremptorily challenged him.

The prisoner himself, in the statement put by him on the record in regard to the juror Hodgins, puts his interpretation on the decision of the Court relative to Sparks: namely, the challenge of Sparks for cause "was not allowed by the said Court, nor was the said challenge for cause tried nor submitted to triers by the said Court, but the said Patrick James Whelan was required to challenge the said Jonathan Sparks peremptorily, if he desired to challenge the said Jonathan Sparks as one of the jurors of the said jury, and that the said challenge should be considered as a peremptory challenge, and not as a challenge



for cause ; and the said challenge for cause was accordingly *taken* and treated as a peremptory challenge, and the said Jonathan Sparks was not thereupon sworn upon the said jury."

Is this anything more or less than saying, "The Court having decided that if I wished to challenge Sparks, and exclude him from the jury, I must do so peremptorily, and that this challenge should be considered as a challenge for cause, it was accordingly so taken and treated." By whom was it so taken and treated when the prisoner put that statement on the record? If not by himself, who else? His treating it so was the only mode by which the juror could properly be excluded from the box, and if he had stated it differently, that it was not so taken and received by the prisoner, then it would be for the Crown prosecutor to consider whether he would have recalled Sparks as improperly excluded from the jury. The whole statement shews to my mind very clearly that Sparks was excluded from the jury as peremptorily challenged by the prisoner, and that he was so excluded, not because he did not wish to have the challenge for cause disposed of, but, that being decided against him, the only way in which he could exclude the juror was by his challenging peremptorily.

Then we are to view the matter in this way :—The Court having erroneously refused to allow the prisoner to challenge Sparks for cause, in order to exclude him from the jury the prisoner was obliged to challenge him peremptorily.

Abbott, C. J., in *The King v. Edmonds* (4 B. & Al. 473), says: "The disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a *venire de novo*. The party complaining thereof applies to the Court, not for the exercise of the sound and legal discretion of the Judges, but for the benefit of an imperative rule of law, and the improper granting or the improper refusing of a challenge is alike the foundation for a writ of error." At page 475 he further observes, "It was said the defendants had a right to make their challenge,

and to have it tried, whether they could sustain in by proof or not. To which I answer, if they had that right and would insist upon it, they should have pursued it rightly and regularly. Not having done so, their ground and their intended proof must be open to examination. And if upon examination it appears that they could not have sustained their challenge, they are not entitled to a delay of justice, in order to give them an opportunity of making an experiment in due form, which, in the opinion of the Court, would be deficient in substance."

I take it that the doctrine laid down in the case from which I have just cited Lord Tenterden's words, applicable to this subject, is, that when the matter is on the record in the form of error the matter is to be decided as a strictly legal proposition, and no considerations of the effect which our decision may have on the parties to the record will be permitted to be taken into consideration by us to mould our judgment by the exercise of discretion, though of course we must endeavour, when we consider what the effect of our decision may be, to arrive at a correct conclusion as to the law of the case, and when we have arrived at that conclusion we are bound to declare it, whatever effect it may have upon others.

In the case of the juryman, in a note to 12 East 231, after a trial was over it was discovered that Robert Curry, who was one of the jurors, had answered to the name of Joseph Curry, and was sworn by that name. Robert was qualified to serve, and was summoned. The Judge considered it would have only been a ground of challenge, and after judgment could not be assigned as error. The Judges were unanimously of opinion that it was no ground of objection, even if a writ of error were brought.

In *The King v. Sutton* (8 B. & C. 419), when it was objected that one of the special jury was an alien, which defendant did not know until after the trial, the Court refused to grant a new trial. Lord Tenterden said, "I am not aware that a new trial has ever been granted on the

ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge."

In *Dovey v. Hobson* (6 Taunt. 460), a person not summoned on the jury was sworn on it. After the case had been gone through, Gibbs, C. J., proposed to discharge the jury, but Vaughan, Sergeant, for the plaintiff, insisted on keeping them, and had a verdict; Best, Sergeant, not opposing, but giving no consent. Gibbs, C. J., said, "Here the objection was taken, and the plaintiff's counsel apprised at the time, that he took the verdict at the peril of not being able to hold it, and therefore we think that the eleven jurymen being well summoned, and a twelfth not being well summoned, and a verdict taken by those twelve, and the objection being pointed out at the time, the Court, in the exercise of their discretion to grant a new trial or not, ought to set aside this verdict, and that there ought to be a rule absolute for a *venire de novo*."

In *Brunskill v. Giles* (9 Bing. 13), the objection was made at the trial that the jury had been convened by the partner of the attorney for the plaintiff, but defendant not being able to support it in evidence, the cause proceeded, and a verdict was found for the plaintiff. On application for a *venire de novo*, Park, J., said: "There is not the shadow of a pretence for this application. The cause proceeded at the trial because no ground of challenge had been established. Instead of withdrawing, the counsel for the defendant chose to address the jury, and take his chance of a verdict: he cannot be allowed to defeat it without even an affidavit of surprise."

In *The Queen v. Sullivan, et al.*, (8 A. & E. 831), defendants were indicted for a conspiracy. On the trial before a special jury, one of the jurymen, after being sworn, stated he had been one of the grand jury who found the bill. He continued in the box. The counsel for the prosecution offered to consent that the juror should withdraw, and the trial proceed with eleven; but, the defendants not consenting, the case went on, and the defendants were con-

victed. Platt, for the defendants, moved on the ground of a mistrial. It did not appear the defendants knew whether the juror had been of the grand jury or not. Lord Denman, in giving judgment, said, "The defendants here did not challenge; and, when the objection was pointed out and it was proposed that the juror should withdraw, they declined assenting to that course, and preferred to stand upon the strict law." The rule was refused.

In *The Mayor, &c., of Carmarthen v. Evans et al.* (10 M. & W. 274), challenges to the array and to the polls were over-ruled. The defendants' counsel declined to appear and try the cause. The challenges were not put upon the record. Plaintiffs recovered a verdict. Defendants moved in arrest of judgment, or to set aside the verdict on the ground of the validity of the challenges. The Court held, the challenges not having been made in a proper manner, they would not make the rule absolute. Lord Abinger said: "If the omission had arisen from the mistake of counsel, or the defendant had been misled by the dictum of the Judge at *Nisi Prius*, we might have granted a new trial and changed the venue; yet that could only have been done on an affidavit of merits, which are not suggested here, and payment of the costs."

In *Doe dem. Earl of Ashburnham v. Michael* (16 Q.B. 621), tried before Parke, B., a person of a different name from the juror was called, but he lived in the same place and followed the same business,—a wine merchant, High street, Brecon. The juror hearing his place of residence, business, &c., so called, and also having been summoned on another special jury, went into the box and was sworn. The case went on: the jury retired: when they returned into Court the names of the jury were called over; then the mistake was discovered. The defendants objected to the verdict. Parke, B., offered to try the case over again by a proper jury, but the plaintiff insisted on the verdict being received, and a verdict was given for the plaintiff. The juror objected to had been originally drawn on the jury, and his



name had been struck out at the instance of the plaintiff. There was a motion to set aside the verdict, and for a *venire de novo*. In giving judgment Patteson, J., said, "The defect having been discovered and insisted on before the verdict was given, we think it is one that cannot be passed over, and that we must make the rule absolute for a *venire de novo*. If it had been discovered after verdict, the question would have been a very different one, and many considerations would have entered into the decision of the question, which might have induced us not to disturb the verdict. But clearly there has been a mistrial here; and we have no other alternative than to grant, not a new trial, but a *venire de novo*."

In *Ham v. Lasher* (referred to in 24 U. C. R. at p. 533, note a), a juror peculiarly obnoxious to the plaintiff had got on the jury by answering to the name of another. The plaintiff mentioned this fact to the Court on the second day of the trial, but did not ask to have the jury discharged, or refuse to proceed further with the trial, but elected to go on. The Court refused to interfere on that ground, holding that if a party to a suit, aware of a fatal objection to the constitution of the jury, elect to go on and take his chance of a verdict, he cannot afterwards be heard urging the objection.

In *Widder v. The Buffalo and Lake Huron Railway Company* (24 U. C. R. 534), the following observations are made:—"Independently of authority, the reason of the thing would naturally suggest, that a plaintiff, clearly aware of a fatal objection to a jury about to try his cause, should not, after electing to take his chance of a verdict, be heard urging an objection which he was quite willing to waive had the verdict been in his favor."

When deciding on strict questions of law we must dispose of this case precisely as we would a civil case. Suppose a defendant in a civil action to challenge a juror for cause, and the Judge erroneously decides against him; suppose the challenge appears on the record, and after that has been done the party making the challenge chooses to



exclude that juror from the jury by one of the three peremptory challenges allowed him by law ; he then goes on with the trial and a verdict is rendered against him. Would we hold that he could fall back on his challenge, and claim to have a *venire de novo*?

Put an extreme case : Suppose he had been forced to use his peremptory challenges to exclude from the jury persons who were clearly incompetent for the causes taken by him to serve on the jury, would the Court order a *venire de novo*? Would it be prudent, in fact, for him to rest his case, if trying to get rid of the verdict, on the errors which, as far as the jurors objected to, would seem to be cured by their not being on the jury who tried the cause? Ought he not rather to apply to the Court for a new trial, and shew how he had been prejudiced by the course he was induced to take from the mistake of his counsel in not standing on his legal rights under the demurrer, or from having been misled by the dictum of the Judge at *Nisi Prius*? If we would only grant relief on an affidavit of merits in that case, then I fail to see how we can, on this bald proposition of law, here decide the question for the prisoner. If he had stood by his demurrer he might urge that the jury were not *omni exceptione majores*, but the defects are purged by the exclusion of the juror objected to from the jury who tried the cause.

The case of *Lithgow v. The Commonwealth* (2 Virginia Cases 297,) goes to the full extent of sustaining the prisoner's case, and even further. In that judgment the Court argue that the improper refusal of a challenge may have an unfavourable effect on the party, to prevent him from renewing his objections when another defective juror is brought forward—that making challenges which are overruled might also influence the mind of the jurors afterwards to be called, and in that way the prisoner might be prejudiced ; and the Court goes to the full length of deciding that, whether the prisoner has exhausted his peremptory challenges or not, the fact that his challenge has been illegally rejected, and he has been compelled to use any

of his peremptory challenges to be relieved from the obnoxious juror, is sufficient ground for reversing the conviction.

*Dowdy v. The Commonwealth*, (9 Grattan's Virginia Reports, 727), is to the same effect: namely, that if a prisoner's objections to the juror be illegally over-ruled it is a good ground for error, though the prisoner may have peremptorily challenged the juror. They refer to *Lithgow's* case as authority.

In *McGowan v. The State*, (9 Yerger, 184, decided in 1836), where the prisoner did not exhaust his peremptory challenges, and he elected a jury *omni exceptione majores*, having peremptory challenges unexhausted, the Court held it did not constitute error to reverse the judgment.

In *Carroll v. The State*, in the Supreme Court of Tennessee, in 1842 (3 Humphreys 315), where the challenge for cause was wrongly decided, and the prisoner challenged the juror peremptorily, as he had not exhausted his peremptory challenges, it was held no ground for reversing the verdict. 9 Yerger 184, above cited, was referred to.

In *The People v. Bodine*, (1 Denio's reports of cases in the Supreme Court of the State of New York, at page 300), in the argument, it is said: "All the jurors who were found indifferent by the triers, were challenged peremptorily, except Cook and McColgan. As to those so challenged and excluded, no question can arise. \* \* The prisoner was not prejudiced by any error in respect to the challenges of these jurors for cause, unless in getting rid of them she lost peremptory challenges which she needed; but it is shewn that, after the jury were empanelled, she had peremptory challenges remaining. We also insist that *as to the two jurors who finally sat on the trial*, it must be considered that the prisoner approved of and accepted them; for although she had seven peremptory challenges left, she forbore to use them to exclude these jurors."

In giving judgment Beardsley J. said, at page 309. "The prisoner challenged but thirteen jurors *peremptorily* although she might have challenged twenty. (2 R.S. 734, § 9.)

As she might thus have excluded all who were challenged for favor, and not set aside by the triers, it is argued that the omission to do so precludes all exception on the part of the prisoner to what was done by the Judge, however erroneous it may have been. The law, it is said, gives the right to make peremptory challenges in order to correct errors of this description, and the prisoner, having refused or neglected to avail herself of this remedy, is thereby estopped from resorting to any other mode of redress. This argument is specious, but I think not sound. Every person on trial is entitled to a fair and impartial jury, and to secure this object, challenges *for cause* are allowed, and are unlimited. If adequate cause is shown, the juror in every instance, should be set aside. This is the right of the party challenging, and is in no case to be granted as a favor. Such is plainly the law where peremptory challenges do not exist, and where they do the rule is the same. \* \*

Peremptory challenges are allowed to a prisoner on trial, to be made or omitted according to his judgment, or his pleasure, will or caprice. No reason is ever given or required for the manner in which the right is exercised by the party. Blackstone says they are allowed 'on two reasons: 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike; 2. Because, upon challenges for cause shewn, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.' (4 *Black. Com.* 353. See also 1 *Chit. Crim. Law* 534; 1 *Inst.* 156 b). In no case is the prisoner bound to resort to

his right to make peremptory challenges. It is armor which he may wear or decline at his pleasure. It is for his own exclusive consideration and decision, and the Court has no right to interfere with his determination. Nor should the prisoner's refusal to make use of her peremptory challenges, as she might have done, preclude her from raising objections to what was done by the Judge; and if, in truth, errors were committed, I do not see that it is less our duty to correct them, than it would have been if the prisoner had fully exhausted her peremptory challenges. The use, or disuse, of that right, I regard as a fact wholly immaterial to the question now before the Court, and one which cannot rightfully exert the slightest influence upon the decision to be made."

In the case of *Freeman v. The People*, decided in the Supreme Court of the State of New York, in which judgment was given by the same learned Judge, reported in 4 Denio, p. 100, the head note as to one of the points decided is, "Where a juror is set aside by a peremptory challenge, the party on whose behalf it was made cannot on error insist upon an erroneous ruling of the Court upon the previous trial of a challenge of the same juror for cause." At page 31, the learned Judge uses the following language: "Several persons drawn as jurors were, in the first place, challenged for principal cause by the counsel for the prisoner; but the Court held that these challenges were not sustained by the evidence adduced in their support. Challenges for favor were then interposed; but the jurors were found by the triers to be indifferent. Various exceptions were taken by the prisoner's counsel to points made and decided in disposing of these challenges; and, although the several jurors then challenged were ultimately excluded by the peremptory challenges of the prisoner, it is now urged that these exceptions are still open to examination and review in this court. I think otherwise. The prisoner had the power and the right to use his peremptory challenges as he pleased, and the Court cannot judicially know for what cause or with what design he resorted to them—*The People v. Bodine* (1 Denio 310).



He was free to use or not use them, as he thought proper ; but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude these jurors, and thus virtually; and, as I think, effectually blotted out all such errors, if any, as had previously occurred in regard to them. But the case of the juror Beach stands on other grounds. He was first challenged, as is said, for principal cause, which, after evidence had been given, was overruled by the Court. He was then challenged for favor, but the triers found him to be indifferent. No peremptory challenge was made, and he served as one of the jury. As to this juror, every exception taken by the prisoner's counsel is now here for examination and review."

In *Stewart v. The State* (8 English, 13 Arkansas, Reports, at p. 742), the Court, in giving judgment on the effect of a prisoner resorting to peremptory challenge after his challenges for cause had been improperly overruled by the Judge who tried the cause, said :—" The plaintiff in error complains that he was compelled, by the decisions of the Court in question, to exhaust three of his peremptory challenges. The record here does not shew that the prisoner had exhausted all his peremptory challenges in the empanelling of the jury, and it seems to have been held, in the case of *McGowan v. The State* (9 Yerger, 184), under similar circumstances, that the judgment would not be reversed for an error in deciding a juror, who had been challenged for cause, to be competent, if the party afterwards challenge him peremptorily. But in the case of *The People v. Bodine*, before cited (1 Denio 281), it did appear that the prisoner had challenged but thirteen jurors peremptorily, although she might have challenged twenty, and it was argued that she was not bound to have excepted (a) a juror erroneously decided to be competent upon her challenge for cause, but

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(a) *Sic—Quærz*, accepted.



might and ought to have corrected the error by availing herself of the peremptory challenges allowed her by law for that purpose. The opinion of the Court was that, in no case is the prisoner bound to resort to his right to make peremptory challenges, but he may exercise it according to his judgment or caprice. 'It is for his own exclusive consideration and decision, and the Court has no right to interfere with his determination.' The question was to be considered as if she had no right of peremptory challenge, and as if the acceptance of the juror was forced upon her in consequence of the erroneous decision, and then she would stand upon the legal exception. It follows, from this reasoning, that if the party chooses to challenge the juror peremptorily when he is not obliged to do so, he, by the exercise of his own will or caprice, has undertaken to correct the supposed error of the Court, and waived the benefit of the previous exception. Because, if the decision was right, the party excepting could not have been injured by it, if it was wrong he had the benefit of his exception; but if at the time in doubt whether it be right or wrong, and he prefers to take the chances for an acquittal, and so elects to rid himself of the obnoxious juror by a peremptory challenge, there is no reason for holding that he can avail himself on error of the exception thus abandoned. And so the Supreme Court of New York decided in the subsequent case of *Freeman v. The People*. Referring to the case in 1 Denio, 310 Judge Beardsley, who delivered the opinion of the Court in both cases, said, 'The prisoner was free to use his peremptory challenges as he thought proper, but, having resorted to them, they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions, growing out of the various challenges for cause, would have been regularly here for revision. But he chose, by his own voluntary act, to exclude these jurors, and thus virtually, and, as I think, effectually, wiped out all such errors, if any, as had previously occurred in regard to them.' Such, we think, is the law applicable to the case now under consideration."

I have endeavoured to look upon the case and the matters before us, as I have already intimated, as purely legal questions, without embarrassing them with considerations of the grave consequence of our decision on the fate of the prisoner. I think it is our duty to do this, and, therefore, looking at it in that light, I am of opinion that the prisoner, by peremptorily challenging the juror Sparks, has put out of our consideration the question whether the points raised in his case were properly decided or not. The jury, as far as he is concerned, is pure, and whether he ought to have been excluded or not in my judgment is not now before us. He has been excluded by the act of the prisoner himself. Whether that arose "through the mistake of counsel or the defendant had been misled by the dictum of the Judge at *Nisi Prius*," to use the language of Lord Abinger, in the case in 10 M. & W., at p. 278, it does not appear to me to be now of any consequence. If, indeed, it could be shewn that the prisoner had been prejudiced in fact by the proceeding, and we were called upon to decide a matter of discretion, and not of mere law, then we might possibly relieve him.

After giving the subject the best consideration I can bestow upon it, and carefully reading and considering the cases to which we have been referred bearing on the subject, I have arrived at the conclusion that the able judgments of the Superior Court of the State of New York, reported in the first and fourth volumes of Denio's Reports, which I have abstracted at some length, and the case of *Stewart v. The State*, in 8 English, 720, based upon and following the cases in Denio's Reports, which I have abstracted at even greater length, and repeating in it some of the passages of the former judgments, lay down the principles which should govern this case:—that the prisoner, by peremptorily challenging the juror Sparks, has put aside the question of the erroneous decision of the Judge as to the right of the prisoner then to challenge him for the cause assigned; and that he has not any *locus standi* to assign error for that decision, or for the rejection of the peremptory challenge of the juror Hodgins.

It may be convenient here to refer to a practice which is said to prevail in England, noted in *Joy on Challenges*, at p. 149, and *Dickinson's Quarter Sessions*, p. 502, 5th edition, 1841, by Sergeant Talfourd, is cited as laying it down:—"But even in misdemeanours, it is usual in England for the officer, upon application to him, to abstain from calling any reasonable number of names, objected to either by the prosecutor or the defendant, taking care that enough should be left to form a jury: and this practice has often been sanctioned by the Court."

In *Marsh v. Coppock*, (9 C. & P. 480), where the Court decided it was no ground for challenge that the juror was a tenant of a nobleman, whose interest in the Borough was supposed to be affected, nevertheless the juror was withdrawn by the plaintiff's counsel. I refer to these matters, as well as to the case in the state trials, to shew with what liberality parties concerned in the administration of justice in England allow jurors who are objected to to remain off a jury, when it is not likely by doing so the ends of justice will be interfered with (*a*).

*Judgment affirmed.*

At the conclusion of these judgments,

*Harman*, for the plaintiff in error, applied for leave to appeal to the Court of Error and Appeal, under Consol. Stat. U. C. ch. 13, sec. 29. He intimated also that the plaintiff would apply to the Attorney General for his fiat for a writ of error to remove the case into that Court.

The plaintiff in error was remanded until Thursday, the 24th December, one of the days appointed for giving

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(*a*) In *Gray v. The Queen*, in the House of Lords (11 Cl. & Fin. 470), Baron Parke says: "The practice" (of peremptory challenge) "prevails equally, so far as my experience goes, in misdemeanours, and in all civil cases; no one ever heard of any impediment being interposed to the defendant or plaintiff in actions, in modern times, objecting to any number of jurymen without cause, and they are always withdrawn; yet in actions there is unquestionably no right of peremptory challenge."

judgments after Michaelmas Term ; and the following order was made :—

IN THE COURT OF QUEEN'S BENCH.

The twenty-first day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

PATRICK JAMES WHELAN,

*Plaintiff in Error,*

v.

THE QUEEN,

*Defendant in Error.*

Patrick James Whelan, the plaintiff in error, being brought here into Court by the Sheriff of the County of York, by virtue of a rule of this Court,

upon hearing Counsel on both sides, it is considered and adjudged by the Court here that the judgment given against the said Patrick James Whelan at the Session of Gaol Delivery holden at Ottawa, in and for the County of Carleton, on the second day of September last, upon an indictment against him for murder and felony, is good and sufficient in law ; and it is thereupon ordered that the said judgment be affirmed. And the plaintiff in error, Patrick James Whelan, being brought here into Court in custody of the Sheriff of the County of York by virtue of a rule of this Court, is remanded to the same custody, charged with the matters in the said rule mentioned. And it is further ordered that the Sheriff do bring the said Patrick James Whelan before this Court on Thursday next.

(Signed) C ROBINSON,

*For the Queen.*

(Signed) SAMUEL B. HARMAN,

*For the Prisoner.*

(Signed) ROBERT G. DALTON,

*C. C. & P.*

On the 24th of December, the plaintiff in error being brought into Court, the leave to appeal applied for on the 21st was granted. *J. H. Cameron*, Q. C., for the plaintiff in error, stated that the Attorney General had signed a



fiat for a writ of error, and he moved for a writ of *Habeas Corpus* to bring the prisoner before the Court of Error and Appeal on the 31st December, which was granted.

*C. Robinson*, Q. C., for the Crown, said there appeared to be difficulties as to the proper mode of bringing the case before that Court, which could be discussed at the proper time.

A rule was drawn up, giving the plaintiff leave to appeal, and a minute of such allowance sent by the Chief Justice, pursuant to the "Rules under the Criminal Appeal Act," published in 8 C. P. 370, and 16 U. C. R. 159.

On the application of *C. Robinson*, Q.C., for the Crown, the following order was made:—

#### IN THE QUEEN'S BENCH.

The twenty-fourth day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

PATRICK JAMES WHELAN, <i>Plaintiff in Error,</i> v. THE QUEEN, <i>Defendant in Error.</i>	}	Patrick James Whelan, the plaintiff in error, being brought here into Court in custody of the Sheriff of the County of York, by virtue of a rule of
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this Court, it is ordered by the Court here that the said Patrick James Whelan, the plaintiff in error, be remanded to the custody of the said Sheriff to await the further order of this Court. And it is further ordered that the said Sheriff of the County of York, here in Court, do receive the said Patrick James Whelan, the plaintiff in error, and detain the said Patrick James Whelan to await the further order of this Court, or till he be otherwise delivered in due course of law.

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## IN THE COURT OF ERROR AND APPEAL.

### WHELAN V. THE QUEEN.

#### *Court of Error and Appeal—Jurisdiction.*

Error, as distinguished from appeal, will lie in a criminal case, from the Court of Error and Appeal to the Queen's Bench, and the writ of error may be as nearly as possible in the form of a Writ of Appeal given by the orders of the Court published in 1850.

Appeals, under Consol. Stat. U.C. ch. 13, sec. 29, as distinguished from error, are in criminal cases confined to such as arise under the Act respecting new trials in criminal cases, 20 Vic. ch. 61, now Consol. Stat. U.C. ch. 113.

In construing the Consolidated Statutes, the Court may refer to the original enactments in order to assist in arriving at a right conclusion.

The prisoner having brought error from the judgment of the Court of Queen's Bench upon the questions arising out of the challenges to jurors (see the head note, ante p. 2-3), such judgment was affirmed.—*Vankoughnet, C.*, *Hagarty, C. J.*, *Spragge, V. C.*, and *Morrison, J.*, dissenting.

On the 31st December, 1868, the prisoner was brought into court (a) upon the writ of *Habeas Corpus*, granted on the 24th, and the return having been read and filed by order of the court—

*J. H. Cameron, Q.C.*, for the prisoner, stated that the object of bringing him before the court was that he might be heard either by way of error or appeal against the judgment of the Court of Queen's Bench, which had affirmed the conviction, judgment and sentence had and pronounced by the Court of Oyer and Terminer, and General Gaol Delivery, in and for the County of Carleton, in September last; which last mentioned judgment had been brought before the

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(a) Before The Honourable William Henry Draper, C. B., Chief Justice of Appeal; Richards, C.J. Q.B.; Vankoughnet, C.; Hagarty, C.J. C.P.; Spragge, V. C.; Morrison, J.; Adam Wilson, J.; John Wilson, J., and Gwynne, J.

Court of Queen's Bench by writ of error :—that in the absence of any precedent, he had now to bring the case before this court so as, as far as possible, to anticipate any objection of form or substance to the exercise of the undoubted jurisdiction it possessed under the Consol. Stat. U. C., ch. 13, sec. 9; which conferred “an appellate civil and criminal jurisdiction throughout Upper Canada \* \* from all judgments of the Courts of Queen's Bench and Common Pleas, and from all judgments, orders and decrees of the Court of Chancery.”

*Mr. Cameron* stated that there was now in Court—

First—A writ of error under the seal of the Court of Queen's Bench, and tested on the 30th December, in the thirty-second year of Her Majesty's reign, in the name of the Chief Justice of Upper Canada, and directed to the same Chief Justice as Chief Justice of the said Court of Queen's Bench, commanding him to send to the Court of Error and Appeal, under the seal of the Court of Queen's Bench and his own seal, the record and process, and all things pertaining thereto, of the judgment on the indictment against the prisoner, returnable on the 31st December. This writ was returned by the Chief Justice to whom it was directed, with a schedule containing the record, &c., called for of the proceedings against the prisoner in that Court.

Secondly.—A writ of error following as far as practicable the form of writ of appeal prescribed by the orders of this Court, passed 8th August, 1850, published in 2 Grant, Appendix, 32, under the seal of this Court, and tested in the name of the presiding judge thereof, on the 30th December, and addressed to the Chief Justice of the Court of Queen's Bench, commanding him without delay to send the record and proceedings, with all things concerning the same, to this Court. The learned Chief Justice also returned this writ as he returned the first. (a)

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(a) The form of this writ, under which the case was afterwards heard, was as follows :—

Victoria, by the Grace of God of the United Kingdom of Great Britain

Thirdly.—The Court of Queen's Bench, on affirming the judgment of the Court of Oyer and Terminer and General Gaol Delivery, against the prisoner, had, on the application of the prisoner's counsel, allowed an appeal from their decision; and the original indictment against the prisoner, and the original record of his conviction, together with the allowance of appeal above mentioned, were certified by the same Chief Justice before whom the prisoner was tried.

Upon one or other of these writs, or on the leave to appeal, he contended that the proceedings were properly before the Court; but he directed his argument principally to support the writs of error, or either of them, as in that case he would be at liberty, if it should be thought advisable, to assign new errors, in addition to those relied upon in the Court of Queen's Bench.

There can be no doubt, he argued, that *error* lies to this Court, and that that is the proper remedy. The case itself is one clearly of error as distinguished from appeal, and this Court is a Court of Error, and as such can entertain the case by way of error. The writ can issue from this Court, by the original Act establishing the present Court of Appeal, 12 Vic. ch. 63, sec. 41, and which constituted it a Court of Error and Appeal in civil and criminal cases. The Court had power to adapt the said Court to the cir-

and Ireland Queen, Defender of the Faith—To the Honourable the Chief Justice of the Court of Queen's Bench, Greeting:

Whereas, in the record and proceedings, and also in the giving of judgment, in our Court of Queen's Bench, in a certain indictment against Patrick James Whelan, of a certain felony and murder whereof the said Patrick James Whelan has been convicted, as it is said, manifest error hath intervened, as by the said Patrick James Whelan we are informed. We therefore, being willing that the said error, if any there be, should, according to the laws of Upper Canada, be duly corrected, do command you that without delay you send, under the seal of the said Court, the record and proceedings aforesaid, with all things concerning the same, to our Court of Error and Appeal, that the said Court of Error and Appeal, (the record and proceedings aforesaid being seen and examined), may further cause to be done thereupon what of right and according to the laws aforesaid ought to be done. Witness the Honourable William Henry Draper, C. B., at Toronto, the thirtieth day of December, in the thirty-second year of our reign.

(L. s.)

(Signed) A. GRANT,  
C. C. E. & A.

cumstances of the Province, as well in regard to the writs of error or other process by which appeals should be commenced, as in respect to the practice and proceedings of the said Court. The Writ of Appeal, now disused under the practice established by the Consolidated Act, was the form prescribed by the Court, by the orders of the Court of Error and Appeal made under 12 Vic. ch. 63, published in 2 Grant, Appendix, 33. That form, which the writ issued here substantially follows, may still be used for criminal proceedings, to which the 32d section of ch. 13 Consol. Stat. U. C., providing that a writ of appeal shall not be used in any *civil* case, does not apply. At any rate, under the provisions of 12 Vic. ch. 63, sec. 41, the Court have power to order a writ to be framed. That Statute is still in force, to the extent of giving the Court such power, for by the first section of the Consolidated Act the Court of Error and Appeal, established by the 12 Vic. ch. 63, sec. 38, is continued, and, it follows, with the same powers in this respect.

*C. Robinson*, Q. C., and *Anderson*, for the Crown, stated that they had no instructions to offer any objection to the jurisdiction of the Court, but were ready, if desired, to state how the case appeared to them.

DRAPER, C. J. OF APPEAL.—We have no doubt of our power to entertain the case. The only question is as to the proper mode of bringing it before us. On this point the Court would like to hear counsel for the Crown.

*C. Robinson*, Q. C., and *Anderson*, for the Crown.—There is a difficulty in the way of bringing error. From what Court is the writ to issue? There is no common law side in Chancery in this Province from which it can issue, and the only statutable provision for issuing writs of error in criminal cases, is Consol. Stat. U. C. ch. 113, sec. 16, but this only applies to removing the judgment of an *inferior* Court of Record in order to its examination in the Court of Queen's Bench or Common



Pleas, returnable in those Courts respectively. Whether the Court of Oyer and Terminer is an inferior Court of Record or not, at any rate no writ of error under this Act could be returnable in the Court of Error. Prior to the passing of the Statute 11 Geo. IV. & Wm. IV., ch. 70, a writ of error in criminal cases from the Queen's Bench in England did not lie to the Exchequer Chamber, but only to the House of Lords, and it was doubted, in *Rex v. Wright*, 1 A. & E. 434, whether that Statute applied to criminal cases, but decided in the affirmative. The right then to bring *error* on a criminal case in this Court, which for most purposes holds a position analogous to the Exchequer Chamber in England, if it exists at all, must exist by Statute. This Court is undoubtedly a Court of Error and Appeal, and the distinction between the two has always been adhered to. The Statutory power of this Court is contained in Consol. Stat. U. C., ch. 13 sec. 9. "The Court shall have an appellate civil and criminal jurisdiction throughout Upper Canada, and an appeal shall lie thereto from all judgments of the Courts of Queen's Bench and Common Pleas." Section 29 provides for certain cases of appeal in criminal matters, but only applies to cases arising on application for new trial; and by sec. 30 no other appeal from a decision of the Court of Queen's Bench shall be allowed, unless the judgment, decision, or other matter appealed against, appears of Record, clearly pointing, if the section applies to criminal matters, to cases in which error is the proper remedy. The difficulty, however, if error is to be brought here, still remains—where is the writ to issue from; and unless the old writ of appeal, framed under the authority of sec. 41, 12 Vic, ch. 63, and which is no longer in use in civil cases, can be adapted so as to be available as a writ of error,<sup>1</sup> the objection would seem insurmountable. This writ, by Consol. Stat. U. C., ch. 13, sec. 32, is no longer to be used in civil cases, for which, according to its form and the orders of the Court, it would seem to have been exclusively framed. It would, however, seem clear that the 12 Vic. ch. 63, which confers the present



power on this Court, and which is consolidated in ch. 13 Consol. Stat. U. C., must have contemplated the Court dealing with questions of error, as at the time of its passing neither the Act for reserving points of criminal law, 14 & 15 Vic., ch. 13, now consolidated in ch. 112 Consol. Stat. U. C., nor the Act respecting new trials in criminal cases, 20 Vic., ch. 61, consolidated in ch. 113 Consol. Stat. U. C., were in force, and the only judgments to which the power could be applicable must have been for faults appearing of record, or strictly speaking grounds of error. No difficulty can arise in treating this as a subject of appeal rather than error, as by Consol. Stat. U. C., ch. 113, sec. 11, the Court has power to award the process which the Court appealed against ought to have given, and may therefore in this case award, if necessary, a *Venire de Novo*. The writ issued by the Queen's Bench, to remove their own proceedings into this Court, cannot possibly be supported.

The Court announced that they would give their decision on Monday the 3rd of January, 1869; and it was understood that, if both sides were prepared, the argument would then proceed at once.

The following order was made :

#### IN THE COURT OF ERROR AND APPEAL.

The thirty-first day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

<p>THE QUEEN v. PATRICK JAMES WHELAN</p>	}	<p>The said Patrick James Whelan, being brought here into Court in custody of the Sheriff of the County of York, by virtue of a writ of <i>Habeas Corpus</i> issued out of the Court of Queen's Bench, It is ordered by the Court here that the said Patrick James Whelan be remanded to the custody of the said Sheriff, to await the further order of this Court. And it is further ordered that the said Sheriff of the County of York, here in Court, do receive the said Patrick James Whelan, and detain the said Patrick James Whelan to await the further order of this Court, or till he</p>
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be otherwise discharged in due course of law. And it is further ordered that the said Sheriff do bring the said Patrick James Whelan before this Court on Monday next, the fourth day of January.

On the motion of Mr. Robinson, Q. C., of Counsel for the Crown.

(Signed) A. GRANT,  
*Clerk Court of Error and Appeal.*

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On the 4th January, 1869, the prisoner was again brought into Court (a), when the following judgment was delivered:

DRAPER, C.J. OF APPEAL.—We fully agree that this Court has criminal as well as civil jurisdiction in error and appeal.

As to the three methods advanced for bringing this case before the Court:—First. We are of opinion that the writ of error issued in this case from the Court of Queen's Bench, to remove the record and proceedings into this Court, cannot be upheld. In civil cases, where the error is in fact and not in law, proceedings in error must be taken in the same Court in which the judgment was given, but if the error be in the judgment itself, error must be brought in another and superior Court. We are not aware of any authority either at common law or by statute, which would enable the Court of Queen's Bench to issue its own writ for the review of its own judgment, returnable in a superior Court, a Court of Error. No such decision is reported, that we are aware of, and it appears to us to be contrary to principle, and that it has no foundation in practice. In this respect we see no distinction between civil and criminal cases.

Secondly. We have no doubt that this Court had full power to issue a writ of error in criminal as well as civil cases.

The question must be decided under our own statutes. The jurisdiction given by them is, to review all judgments of the Queen's Bench and Common Pleas.

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(a) The same Judges were present as on the 31st December, with the addition of Mowat, V. C.

Then, under the 41st section of 12 Vic. ch. 63, power is given to the Court to make rules. "as well in regard to the *writs of error* or other process by which appeals should be commenced" as to other matters. That power was in force only for two years, but it distinctly recognizes that writs of error were contemplated by the Legislature as process of this Court. Under this enactment the Court duly promulgated a code of rules (2 Grant, Appendix, 32), beginning with ordering that the first process in appeal from judgments of the Courts of Queen's Bench or Common Pleas should be by writ of appeal, which *might* be in the form given. That form, though obviously framed for a civil cause, and though styled a writ of appeal, is in all respects (except the description of the cause) a writ of error, and the writ before us is almost *verbatim* the form given, except that it complains of a judgment on an indictment, instead of in a certain suit between A. B. and C. D. The 20th rule evidently contemplates proceedings in error, as distinguished from an appeal properly so called.

Again, in the 14 & 15 Vic., ch. 13, sec. 5, it is enacted, that whenever any writ of error shall be brought upon any judgment, *or* (Qu? on) any indictment, information, presentment or inquisition in any criminal case, and the Court of Error shall reverse the judgment, such Court of Error may pronounce the proper judgment or remit the record, &c. There is nothing else in this Act referring to a Court of Error—the other sections referring to the reservation of questions of law which might arise in criminal trials for the decision of the superior Courts. It seems clear that by the name "Court of Error" the Legislature meant the Court existing under the Statute 12 Vic.

Then there is the Statute 20 Vic. ch. 61, consolidated in ch. 113 of Consol. Stat. U. C., in which the title is "An Act respecting New Trials and Appeals and Writs of Error in Criminal Cases in Upper Canada." The 16th section provides that the Courts of Queen's Bench and Common Pleas may issue writs of error to remove the record of the judgment of an inferior Court of Record, and the 17th section re-enacts the 5th section of 14 & 15 Vic. ch. 13.

The Statute 20 Vic., ch. 5, sec. 20, dispenses with a writ of error and appeal in any civil case, and provides that the proceeding to appeal against a judgment shall be a step in the cause. It is similar to the 148th section of the English Common Law Procedure Act 1852, except that the latter does not contain the word "appeal." But it is not to be overlooked that the words "in any *civil* cause" are not in the Statute 20 Vic., ch. 5, sec. 20, but are introduced into the Consolidated Act, as if carefully to preserve criminal proceedings intact.

Indeed the two words "error" and "appeal" are somewhat indiscriminately used in our statutes; though confining attention to common law cases we may, not altogether without difficulty, treat proceedings which require to be commenced by writ as proceedings in error, while those which in the statute are grouped under the heading "In certain civil cases" will be more correctly styled appeals—under which designation cases arising under the 29th section will come, especially if in construing that section we refer to the Statute 20 Vic., ch. 61, sec. 4.

Dispensing with a writ of error and appeal in civil cases does not necessarily abrogate the rule of Court above referred to, that the first process in appeals (error being treated as within that term) from common law courts, shall be by writ, though I was of a different opinion at one time. For the form of writ given, changing the statement of the cause in which error is alleged from a civil to a criminal proceeding, is in all other respects the form of a writ of error, and is equally suitable for either class of cases. We have adopted the conclusion, that the writ now under consideration may be upheld under the authority of that rule.

If not, still it is clear to us, that the statutes to which we have referred recognize a writ of error as a process known to our law, and intended to be used in the exercise of the jurisdiction of this Court. The very direction that such a writ shall not be used in a civil cause is an affirmance that such a writ might otherwise be used; and as to criminal cases, no statute has declared that it is no longer to be sued out.



Upon these grounds we think the case is properly brought before us by this writ of error.

We think it unnecessary to say more than a few words on the third point. We think that appeals—using the word as importing something distinct from writs of error—are in criminal cases confined to such as arise under the 20 Vic., ch. 61, sec. 4. We think that we are, in construction of the Consolidated Statutes, at liberty to refer to the original enactments in order to help us to a right conclusion. With that aid we entertain no doubt that this case could not be properly brought before us in this manner. The 8th, 9th and 10th sections of the Act respecting the Consolidated Statutes of Upper Canada, (Consol. Stat. U. C. ch. 1) confirm us in our opinion that the original act may be looked at to ascertain the effect of the consolidation.

The following errors were then assigned by the prisoner, being substantially the same as the third and fourth errors assigned in the Court below. The first and second errors there relied upon were not renewed.

And now, on this fourth day of January, in the year of our Lord one thousand eight hundred and sixty-nine, before our said Court of Error and Appeal, cometh the said Patrick James Whelan, under the custody of the Sheriff of the County of York, by virtue of a writ of *Habeas Corpus* issued in that behalf, and immediately saith that in the record and proceedings aforesaid, and also in giving judgment aforesaid, there is manifest error, in this:—

That it appears by the record that the said Patrick James Whelan challenged Jonathan Sparks, one of the jurors impannelled and returned upon the said jury, for cause of favor, as he had a legal right to do, and that the said challenge was, contrary to law, disallowed.

That it appears by the said record that the said Patrick James Whelan challenged Benjamin Hodgins, one of the said jurors, peremptorily, as he had a legal right to do, and that the said challenge was, contrary to law, disallowed by the Court, on the ground that by the challenge of



the said Jonathan Sparks the said Patrick James Whelan had exhausted the twenty challenges allowed him by law ; whereas, the said Patrick James Whelan says that the said Jonathan Sparks should have been struck off the said jury on his challenge for cause, and not as on a peremptory challenge, and that on the statements on the said record the said Patrick James Whelan was entitled to twenty-one challenges—one challenge for cause and twenty peremptory challenges,—and that he was allowed by the said Court only twenty challenges in all.

Joinder in error on the part of the Crown, *ore tenus*, instant.

The case was then argued.

Before the prisoner's counsel entered upon his argument the Court stated their unanimous opinion that the prisoner had legal right to challenge a juror for cause of favor, although he had not, at the time of taking such challenge exhausted the full number of twenty peremptory challenges. The counsel for the Crown stated that they did not desire to argue this point.

*J. H. Cameron*, Q.C., for the plaintiff in error, in addition to the arguments and authorities in the Court below, urged more especially that the record did not shew a peremptory challenge of Sparks taken by the prisoner.

It appears from the words of the written judgment, made part of the record, that the challenge was decided by the Court to be a peremptory challenge before the prisoner had done anything except claim the right to challenge for cause, or had been called upon to do anything. The Court itself ruled the challenge to be a peremptory one, and the prisoner, "in deference to the said judgment," simply acquiesced. It cannot be said, therefore, that he of his own accord peremptorily challenged Sparks, and unless it appears clearly that he did so, this challenge could not be counted against him. It was a peremptory challenge by order of the Court, not by the act of the prisoner, and such a forced acquiescence cannot alter the prisoner's position or deprive him of his rights.

It has been said, in the Court below, that he should have done more than accept the judgment—that he should have protested ; but this was unnecessary. In *Beaudry v. The Mayor of Montreal*, 11 Moore P. C. 426, where the same argument was used, Pollock, C. B., in giving the judgment of the Court, said—“The claimant could do nothing more than he did ; it was not his business to protest in Court, but respectfully to submit to a legal decision. In order to prove that he acquiesced, and waived his right to complain of an illegal decision, it ought to be shewn that he said or did something to give the Court jurisdiction, which the act in question did not give them. Mere respectful acquiescence or submission to the ruling of the Justices will not, we think, amount to a waiver.” In *Vyvyan v. Vyvyan*, 30 Beav. 74, the Master of the Rolls said—“Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim.”

But admitting it to have been a peremptory challenge by the prisoner, it could not be a waiver. The judgment, which appears on the record, is now admitted to have been erroneous. It stands there, independent of all other proceedings, an erroneous judgment ; nothing done subsequently by the prisoner can remove or cure the error ; nothing can be imported into the record to give validity to a judgment bad in itself ; and the prisoner is entitled by writ of error to get rid of it. This right he cannot waive, and the doctrine substantially affirmed in *Regina v. Bertrand*, L. R. 1 P. C. 534—“that a prisoner can consent to nothing”—must apply.

It is said, too, that having chosen to exclude Sparks by a peremptory challenge, the prisoner was not prejudiced ; but this is a fallacy. It was not his choice. He was driven either to do this or let Sparks form one of the jury—a man who is alleged on the record to have said he would hang him. Had he not challenged peremptorily, he would have been told that he ought to have done so, having it in his power, and that it was his own fault therefore, not the result

of the judgment, that Sparks was allowed to be sworn—*The People v. Bodine*, Denio, 310. He was placed in this difficulty and driven to this choice by the wrong judgment, and it is impossible to say that this was no prejudice. We have extended the right of new trial now to criminal cases, so that if in the course of his trial a prisoner is in any way prejudiced, either by misdirection or the admission or rejection of evidence, or in any other respect, either in law or in fact, he can get ample redress; and it would be most unjust to refuse a remedy for the serious denial of justice here suffered in so grave a case. No one can tell, or is entitled to say, what effect this judgment may have had upon the prisoner's course, or how many others he might have challenged for cause had his right not been disallowed. [DRAPER, C. J.—Should he not have claimed so to challenge, if any of those called afterwards could be objected to]. No; the claim had been adjudged once against him, and he was not called upon to renew it.

One case had been found since the argument in the Court below—*Mulcahy v. The Queen*, Ir. L. R. 1. Q. B. 12. A challenge for cause there having been overruled, the juror, Booth, was challenged peremptorily, and error was brought, on the ground (amongst others) that the challenge should have been allowed. The facts, therefore, presented the question raised here, but this point was not insisted upon by the Crown, and is not decided. Two of the Judges, however, notice it. O'Brien, J., at p. 60, says:—"It was suggested by my brother Fitzgerald, during the argument, that, even supposing the challenge to Mr. Booth should have been held good upon demurrer, still the allowance of the demurrer cannot be relied on as cause of error, inasmuch as Mr. Booth was peremptorily challenged by the prisoner after the allowance of the demurrer, and was not sworn on the jury; and inasmuch as the full number of peremptory challenges to which the prisoner was entitled was not exhausted before a full jury was sworn. It appears that there were only eighteen peremptory challenges altogether; but this point was not relied on by the Crown counsel; and Mr. Lawson,

in his reply for the Crown, conceded that the Court should now decide the question of error according to what in their opinion should have been the decision of the Court below at the time the challenge was taken. I do not, therefore, think it requisite to say more upon this point than that it would, in my opinion, be difficult to speculate how far (having regard to the arrangement of the jury panel) the disallowance of the challenge to Mr. Booth might have influenced the prisoner with respect to the peremptory challenges of the jurors subsequently called, and rendered the constitution of the jury by which he was tried different from what it would otherwise have been." The fair inference from these remarks is, that if the constitution of the jury had been altered, as it was here, by the disallowance of the challenge for cause, he would have held such disallowance to be ground of error. Fitzgerald, J., in his observations on the point, expressly relies on the fact of the peremptory challenges being unexhausted (*a*). On the whole, therefore, this case, though not a decision on the point, tends in favor of the prisoner here. The judgment of the Court below, holding the disallowance of the challenge for cause right, was afterwards affirmed in the House of Lords, L. R. 3 H. L. 306, but this point is not there noticed.

In this case the effect of the judgment was to deprive the prisoner of a clear legal right, and to alter thereby the constitution of the jury. He was entitled to challenge Sparks for cause, and to twenty peremptory challenges besides; and both rights were taken away. Had the judgment been in his favor he would have excluded Sparks for cause, and Hodgins by a peremptory challenge; but Hodgins sat on the jury against his will, and the constitution of the jury was thus altered to his prejudice. It was not a jury, "who after all just causes of challenge allowed, remained as fair and indifferent," to which he was entitled by Statute (Consol. Stat. U. C. ch. 31, sec. 94.) for there was a just, that is, a legal, right to challenge Hodgins.

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(*a*) See his remarks extracted at length in the judgments, post, p. 145, 179-180.



*C. Robinson*, Q. C., and *Anderson* for the Crown, the defendant in error (after again urging the argument in the court below that the matter was not examinable in error, and referring to the arguments and authorities there on the main question):—It is essential to bear in mind the distinction between an assignment of error and an application to the discretion of the court,—for the whole strength of the case for the plaintiff in error rests in disregarding this distinction, while the force, and it is submitted the unanswerable force, of the argument for the Crown depends upon maintaining it. In reason and justice too this distinction should be strictly adhered to. The plaintiff, if he had had any substantial injustice to complain of, could, and no doubt would have applied for a new trial, under our statute, Consol. Stat. U. C. ch. 113. By resorting instead to his writ of error, a course now taken for the first time in this country in a criminal case, he in effect declines any enquiry into the merits of his conviction, and says, “Guilty or innocent, the record shews manifest error in law, of which I take advantage.” This ground he is entitled to take, and the Crown cannot answer it by shewing that no substantial injustice has been done. They are fully justified therefore in insisting, as they do, that the plaintiff should be held to all the consequences of his form of application.

Error or no error in law, then, being the question, it is one which must be determined by strictly legal considerations. Error in law cannot be confessed, even by the Attorney General under the sign manual, for the court must judge it to be error, and their judgment will be a precedent—*Rex v. Wilkes*, 4 Burr. 2551, 1 Ch. Crim. L. 754. The court will not overlook it even with consent of parties—*Giles v. Rex*, 11 Price 594; or pass it over though not assigned—*Castledine v. Mundy*, 4 B. & Ad. 90; *Bruce v. Wait*, 1 M. & G. 1. In *Rex v. Wilkes*, 4 Burr. 2563, Lord Mansfield said his anxiety was so to explain the grounds of their decision on the errors assigned, “as to satisfy all mankind that a flaw of form given way to in this case could not have been got over in any other.” No considerations therefore can



properly prevail here which would not also have prevailed in the most trivial case, or which would not have been equally fatal to an acquittal under similar circumstances.

Upon a judgment which is not final, but interlocutory, as here, error will not lie unless such judgment has been followed by its legal, as distinguished from its actual, result: that such result must be Sparks going upon the jury, is evident from the nature of the judgment, if in favor of the prisoner—viz., a *venire de novo*, which can only be awarded on the ground of a mistrial, and unless the juror serves there can be no mistrial—Per Fitzgerald, J., in *Mulcahy v. The Queen*, Ir. L. R. 1 Q. B., p. 67. The argument that of itself, though it has had no effect on the final judgment, it must be matter of error, would lead, as has been shewn in the court below, to manifest absurdity. To the instances already cited, may be added *Regina v. Winsor*, L. R. 1 Q. B. 303, where, Winsor being tried first, one Harris, indicted with her, was allowed to give evidence for the Crown. This was objected to on error, as no verdict had been taken or *nolle prosequi* entered as to Harris. On the argument it was said that the question did not arise, for the record did not shew that Harris was examined; and it seems to have been admitted that this was essential.

In *Wright v. The Queen*, 14 Q. B. 148, the plaintiff in error, after appearing and pleading guilty, sought to reverse the judgment for defects in the jury process. Parke, B., said, “We do not see how a defect in proceeding to trial, that proceeding having from defendant’s solemn act on record become wholly immaterial, can affect the validity of the judgment;” and it was held that he had waived the defect. *Corsar v. Reed*, 17 Q. B. 540, upholds the same principle.

The erroneous judgment must therefore have had some effect, and on principle it seems clear that the effect, in order to support error, must be its legal effect. It is not what for any reason a prisoner may choose to do in consequence of an erroneous interlocutory judgment, that can form matter of error, but only what follows by law as a consequence of such judgment.—In *Tey’s Case*, 8 Rep. 39 b. it is said, “A man shall not reverse a judgment for error if he

cannot shew that the error is to his disadvantage." It must be to the damage of the plaintiff—2 *Saund.* 46 c. No person can bring a writ of error who is not "prejudiced by the judgment."—2 *Saund.* 101 f; see also *Co. Lit.* 288 b.; *Bac. Ab.* Error, K. 4. Legal disadvantage and legal prejudice only is here intended, for the law regards no other. In actions for breach of agreement there is often great actual damage sustained, which the law gives no redress for. So in an action by husband and wife for slander of the latter, in consequence of which the husband cast her off, it was held that this not being the necessary or reasonable, though the actual, result of the slander, could form no ground of damage—*Lynch v. Knight*, 8 Jur. N. S. 724. Here the only legal result of this judgment, the only legal prejudice that the plaintiff could suffer, was the placing Sparks on the jury, which he chose to prevent; and the only real ground of complaint now is, that his counsel, being uncertain at the moment as to the law, in which he might well be excused, chose rather to exclude Sparks than to risk letting him go upon the jury in a case so important, relying upon his objection; and that he was induced therefore by the erroneous judgment to throw away a peremptory challenge. This might have formed ground for an application for new trial, but it is not error. Should the same judgment be again given, no counsel would hesitate for a moment to let the juror serve, and the judgment would be no prejudice to his client, but an advantage. He would be tried by a jury, which could not convict with effect, but which could effectually acquit, for the Crown could not assign error on the erroneous judgment in its own favor. The law however is the same now as at the time of the trial, and uncertainty as to a new point, however excusable, can have no bearing on the question of error. If it could, the ignorance of a junior might as well be urged as the natural doubt of a leader, and it would be impossible to draw the line.

The exhaustion or non-exhaustion of the peremptory challenges cannot affect the question, and those cases in the States which give weight to this fact are not applicable on

a question of error here. There all objections available in any way are treated as error, the practice being probably established by their statutes; a reference to the United States Digest, under the head Error, will shew this at once. A writ of error or bill of exceptions apparently answers with them all purposes of an application for new trial, or for relief on any ground.

As to the first challenge, error or no error must depend upon what was done with regard to Sparks upon the judgment when given. The prisoner could not make it error or not at his discretion by what he might choose to do afterwards as to some other juror.

Then it is said that the prisoner did not challenge peremptorily, but that it was the act of the court. The record says that the challenge was "taken and treated" by the prisoner and the Attorney General "as a peremptory challenge for and on behalf of the said Patrick James Whelan"—not merely treated as a challenge adjudged by the court, but taken by the prisoner; and to "take a challenge" is the appropriate legal expression for to challenge—*Hawk. P. C.*, Book 2, ch. 43, secs. 1, 4, 10; *Foster*, 7; *Co. Lit.* 158 a.; *Joy on Challenges*, 186; *Rex v. Edmonds*, 4 B. & Al. 473.

The plaintiff for this argument relies upon the words of the Chief Justice in his decision at the trial; but this, though on the record, forms no part of the actual judgment, which is only that the prisoner "is not now entitled to challenge for cause the said Jonathan Sparks." What follows is merely the reason for that judgment, and cannot be matter of error. Besides, Sparks was called, and yet he did not sit on the jury. He was not ordered to stand by for the Crown, or excused by the judge, and the prisoner was prevented from challenging him for cause. How then was he excluded, if not by the peremptory challenge? If the statement does not shew that the prisoner in words took the peremptory challenge, it at least shews that he heard the grounds of the judgment read stating it to be such a challenge, if any, and that he sat by in silence, making no objection, while it was so treated by the court and by the Crown, and Sparks thereupon was excluded. He thus took advantage of it as a per-

emptory challenge, and the Crown was prevented from ordering Sparks to stand by, and this is equivalent to his taking the challenge in words; *qui tacet consentire videtur*. The law is constantly administered on this understanding, which applies in criminal as well as in civil cases. Leave to enter a verdict cannot be reserved without the consent of the jury, but they are held to have assented by hearing it reserved without objection. So a plaintiff cannot be non-suited without his consent, but consent is implied when he allows leave to enter a non-suit to be reserved without objecting at *nisi prius*—*Broom* Leg. Max. 3rd Ed. 132; *Morrish v. Murrey*, 13 M. & W. 52, 57; *Teacher v. Hinton*, 4 B. & Al. 416; *Gosling v. Veley*, 7 Q. B. 55; *Morgan v. Evans*, 3 C. & F. 205; *Ch. Arch. Prac.*, 12th ed., 1530.

*Beaudry v. Mayor of Montreal*, 11 Moo. P. C. 399, is not against the Crown, for the prisoner here “did something,”—he peremptorily challenged.

The case of *Mulcahy v. The Queen* is, so far as it goes, in favor of the Crown. O’Brien, J., expresses no opinion whatever; and the remarks of Fitzgerald, J., shew clearly that, in his judgment, if the prisoner intended to rely upon his right of challenge he should have allowed Sparks to be sworn. This could not depend upon what might be done afterwards.

The two challenges of Sparks and Hodgins must be treated separately. As to Sparks there was no error, because he was not sworn; and as to Hodgins there was none, because the prisoner having chosen to challenge Sparks peremptorily, for what reason is immaterial, had already had the twenty challenges allowed to him by the statute.

At the conclusion of the argument an order was made, that the said Patrick James Whelan be remanded to the custody of the Sheriff of the County of York, to await the further order of this Court; and that the said Sheriff do bring the said Patrick James Whelan before this Court on Friday, the twenty-second day of January instant, at eleven o’clock in the forenoon.



On the 22nd of January, 1869, the prisoner was again brought into Court, and the learned Judges differing in opinion, the following judgments were delivered :—

DRAPER, CHIEF JUSTICE OF APPEAL.—The record shews that after twelve jurors had been peremptorily challenged by the prisoner, and thirteen had been told to stand aside, and after seven had been sworn, Jonathan Sparks was called ; “and thereupon the said Patrick James Whelan challenges Jonathan Sparks, one of the said jurors, because he says that the said Jonathan Sparks is not indifferent between our Sovereign Lady the Queen and him, the said Patrick James Whelan in that the said Jonathan Sparks has stated that if he was on Whelan’s jury he would hang him. And the Queen, by the Attorney-General of Ontario, says that the said Patrick James Whelan is not *now* entitled to challenge for favor the said juror Jonathan Sparks, in this, that the said Patrick James Whelan has not exhausted his twenty peremptory challenges, only twelve jurors being challenged by him peremptorily. And the said Patrick James Whelan says that the said answer of the said Attorney-General, on behalf of our said Sovereign Lady the Queen, to the said challenge of the said Patrick James Whelan to the said juror Jonathan Sparks, is not sufficient in law. *And hereupon* it is considered, and adjudged, and ordered by the Court, that the said Patrick James Whelan is not *now* entitled to challenge for cause the said Jonathan Sparks, and the said Judgment is delivered by the said learned Chief Justice in writing, as follows: ‘I overrule the demurrer. I decide that the prisoner’s challenge is good as a peremptory challenge, and not as a challenge for cause; and if his peremptory challenges of twenty, including this, are exhausted, I rule this is to be considered as a peremptory challenge, and not for cause.’ And *thereupon*, in deference to the said judgment, the said challenge is accordingly *taken* and treated by the said Patrick James Whelan and the said Attorney-



General *as a peremptory challenge for* and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury."

Another juror was then sworn, and one was directed by the Crown to stand aside, and three were peremptorily challenged by the prisoner. Other jurors were called, among them George Cavanagh. "And the said Patrick James Whelan challenges the said George Cavanagh for cause, and says that the said George Cavanagh is not indifferent between our Lady the Queen and the said Patrick James Whelan." Upon this triers were sworn, who found that George Cavanagh was indifferent, and he was thereupon sworn upon the jury; and after stating that another had been set aside for the Crown, and Robert McDaniel had been sworn upon the jury, the record proceeds: "And now at this day comes as well our Sovereign Lady the Queen, by her Attorney General of the Province of Ontario, as the said Patrick James Whelan; and the said Patrick James Whelan peremptorily challenges Benjamin Hodgins, one of the jurors impannelled on the said jury, because that the said Patrick James Whelan, before his peremptory challenges were exhausted, challenged for cause one Jonathan Sparks, one of the said jury, and the said challenge for cause was not allowed by the said Court, nor was the said challenge for cause tried nor submitted to triers by the said Court, but the said Patrick James Whelan was required to challenge the said Jonathan Sparks peremptorily, if he desired to challenge the said Jonathan Sparks as one of the jurors of the said jury, and that the said challenge for cause should be considered as a peremptory challenge and not as a challenge for cause; and the said challenge for cause was accordingly taken and treated as a peremptory challenge, and the said Jonathan Sparks was not thereupon sworn upon the said jury; and this the said Patrick James Whelan is ready to verify. And Her Majesty, by the Attorney General of Ontario, says that the said Patrick James Whelan is not entitled in law to challenge peremptorily

Benjamin Hodgins, one of the jurors impannelled on the said jury, in this, that the said Patrick James Whelan had already exhausted his peremptory challenges of twenty jurors, and the challenge of the juror Jonathan Sparks for favor having been disallowed, he subsequently challenged the said last-mentioned juror peremptorily, before the said twenty challenges were exhausted, is not now entitled to challenge peremptorily the said juror Benjamin Hodgins, after the said twenty jurors have been exhausted, without assigning cause therefor. And hereupon it is considered and adjudged, and ordered by the Court here, that the said Patrick James Whelan is not entitled in law to challenge peremptorily the said Benjamin Hodgins; and the said challenge is disallowed, notwithstanding that the said Patrick James Whelan claims the right to challenge peremptorily the said Benjamin Hodgins; and hereupon the said Benjamin Hodgins" is sworn upon the said jury.

The two errors which are assigned appear to me to involve the following questions:—

1. Was the judgment of the Court on the prisoner's demurrer to the objection or counter-plea of the Attorney General an absolute denial of the right of the prisoner to challenge Sparks for cause of favor.

2. If it was so, was it a right judgment in law.

3. If it was so, and was wrong, does it appear by the record that the prisoner, after that judgment, peremptorily challenged Sparks.

4. If so, is the erroneous decision on the demurrer, looking at the whole record, a sufficient reason for ordering a writ of *venire de novo* to be issued.

The disallowance by the Court of the prisoner's peremptory challenge of Benjamin Hodgins was either right or wrong, according to the conclusions arrived at on the foregoing questions. If the prisoner had, when he took this challenge, already exhausted his twenty peremptory challenges, the decision was right. In order to determine the first and second questions, it is necessary to examine the record with some minuteness.

It appears that the prisoner challenged Jonathan Sparks for cause of favor, upon which the Counsel for the Crown objected that the prisoner was "not *now* entitled" to this challenge, because he had not exhausted his peremptory challenges, and the record shews that the prisoner at that time had taken only twelve peremptory challenges. To this objection, which may be likened to a dilatory plea, the prisoner demurred, and a formal and complete judgment was given, that the prisoner was "not *now* entitled" to challenge Sparks for cause. This decision prevented the prisoner from challenging Sparks for cause at that time. Did it decide more than is in effect decided when a juror is ordered to stand aside at the instance of the Crown? It appears to me to amount only to putting Sparks aside until the prisoner's peremptory challenges were exhausted.

I have no doubt it was an incorrect ruling; but it neither compelled the prisoner to allow Sparks to go upon the jury, nor to prevent his doing so by taking a peremptory challenge. If the prisoner said or did nothing, yielding to the decision just as far as it actually went, the Crown Counsel must either have prayed that Sparks might be sworn, or have let him stand by as for the prisoner until the whole panel had been perused and he was called again, when, if the prisoner had exhausted his peremptory challenges, the challenge for cause must have been received and triers appointed. It appears to me a mistaken and a forced construction of the judgment as above set forth, to say that it wholly denied the right of the prisoner to challenge Sparks for cause. That, however, is the construction put upon this judgment when the peremptory challenge to Hodgins was taken, for the prisoner asserts there that he was *required* to challenge Sparks peremptorily if he desired to challenge him at all; he asserts that it was decided that the challenge for cause which he offered should be considered as a peremptory challenge, and not as a challenge for cause; and further, that the *challenge for cause* was taken and treated as a *peremptory challenge*.

This contention is however founded on the assumption

that the learned Chief Justice delivered the judgment in writing, the contents of which are set forth *in hæc verba*. Now we are dealing with a record, and we must apply to words that technical or artificial sense in which they are used in matters of record. The "*ideo consideratum est*" is the long established form by which judgments of record usually commence, and that form is used in entering of record the judgment on the demurrer. The statement which follows that "the said judgment is delivered by the learned Chief Justice in writing," does not make the contents of the writing the judgment in the technical sense. The sole point raised on the demurrer—*i. e.*, whether the prisoner could then challenge for cause—was completely adjudged, while these written observations, if we are at liberty to look at them at all, refer to matters which were not in question either by the challenge to Sparks, by the objection or counter-plea of the Crown, or by the demurrer. I think I may properly cite the language of Lord Campbell in *Mansell v. The Queen* (8 E. & B. 80), "Nor do we attach any weight to the remark which fell from the learned Judge, although it be unnecessarily set out upon the record."

When that case was before the Exchequer Chamber; *Bramwell, B.*, after remarking that by a long established practice the Crown had the right to require the Judge to set aside any juror till the panel was perused, adds, "Consistently with this, I think the Judge may in his discretion, for sufficient cause, further postpone the time of assigning cause, either for the Crown or the prisoner, but not as a matter of right on a mere request without sufficient cause. I think the sufficiency of such cause a matter for his discretion; and, like every other matter which is to be decided according to discretion, *it ought not to appear upon the record, and is not examinable in error.*" *Watson, B.*, also says that he did not think the points raised in that case were examinable in error. And Willes, J., in the same case, after observing on the opinion of Perrin, J., in *Gray v. The Queen* (6 Ir. Law Rep. 259), as to the duty of a Court of Error to review all matters when put on the record, says



his impression is the other way, and in support of it refers to *Rex v. City of Worcester*, Skinner, 101.

In *Mellish v. Richardson* (9 Bing. 125) in delivering the opinion of the Judges, in answer to questions submitted to the House of Lords, Tindal, C. J., says: "The proper object of a writ of error is to remove the final judgment of the court below for the revision of the superior court, in order that such court, from the premises contained in the record of the inferior court, may either affirm or reverse the judgment." After stating the premises, the first of which are the pleadings between the parties and the last is the judgment, he proceeds: "All these premises, from which such judgment has been derived, the parties to the suit below have a right *ex debito justitiæ* to have upon the record. But the orders or rules for amendments of proceedings made by a court in the progress of a suit therein depending, do not fall within the description of any part of the record; but such orders are strictly and properly matters of practice. \* \* \* \* \* The practice of the courts below is a matter which belongs by law to the exclusive discretion of the court itself. \* \* \* \* \* So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that when it was found expedient that the *opinion, in point of law*, of the judge who tried the cause should be made the subject of revision by a superior court, the Statute of Westminster the Second (13 Ed. I.) expressly gave authority for that purpose by a bill of exceptions." It is scarcely necessary to refer to the authorities which decide that a bill of exceptions does not lie in a criminal case.

In the present case, taking the objection of the Crown to the prisoner's claim to challenge Sparks for cause as a counter-plea, which was demurred to, the objection was simply dilatory, and the judgment on it did not go beyond the objection. The observations of Bramwell, B., which I have cited, are very applicable, and as appears to me are very sound. The right of the prisoner to challenge for cause,



though he has not exhausted his peremptory challenges, we fully recognize ; but if, as I think, the right of postponing the hearing and trial of that cause is discretionary with the Judge, then it must follow that the question becomes only one of practice, and therefore is not examinable in error. The prisoner might, under our statute, have applied for a new trial in the term following his conviction, "upon any point of law or question of fact," and might there have raised the question, if it is, as I have considered it, one of practice, and if dissatisfied with the judgment on that motion, might have brought the case by appeal here.

The language of *Willes, J., in Irwin v. Sir George Grey* (19 C. B. N.S. 585, 11 Jur. N.S. 860) points out the difference between motions which the Court can decide according to the merits, and proceedings on writs of error, in which he observes the Court "must decide aye or no whether there be ground of error ; and, if there be, we have no alternative, but must reverse the judgment, though no injustice appears to have been done." But I do not understand the learned Judge to intend to give a larger scope to the operation of a writ of error than is given by Tindal, C. J., in *Mellish v. Richardson*, or to his opinion thrown out, though not given as a settled conclusion, that the introduction of statements upon a record does not necessarily impose on the Court of Error the duty to review them.

The first error assigned in this case, being that the prisoner's challenge for cause was disallowed, is not sustained by what appears upon the record, and the joinder in error, *in nullo est erratum*, does not admit the fact (*i. e.* the disallowance assigned for error) unless it is well assigned in point of form, which it cannot be said to be when it is contradictory to the record itself, as I take it to be when it asserts the disallowance unqualified of the challenge.

Then what is the proper interpretation to be given to the statement on the record that the juror Sparks was peremptorily challenged ? I understand the prisoner's counsel to contend that this statement does not shew that the

prisoner took the challenge, or if it does, it shews also that it was taken in submission to the judgment of the Court, meaning by the word judgment that which immediately follows "hereupon it is considered," and that which was written by the learned Chief Justice; and therefore that it was not the voluntary act of the prisoner. Now, as Mr. Robinson argued, the juror was not rejected as the result of a trial on a challenge for cause, nor did the Crown require that he should stand aside, nor did he go upon the jury. How, otherwise than by a peremptory challenge, could he be rejected *in toto*? And the record states a challenge taken and treated by the prisoner and the Attorney General as a peremptory challenge for and on behalf of the prisoner. The prisoner is stated to have been an agent in taking this challenge, and no one but he could take it. I have no doubt whatever that the record shews he did take it.

I do not rest upon the ground of apparent acquiescence, but on the ground of an election on the prisoner's part to exclude Sparks by a peremptory challenge. I am not at liberty to speculate upon his motive or his possible misunderstanding of the legal consequence of the judgment given, that his challenge for cause could not then be entertained. I do not give any other effect to the words "in deference to the said judgment," than that which I consider their legal effect,—namely, a submission to the judgment given, not to the opinion expressed by the Judge. After the judgment on the demurrer was given, if Sparks had been immediately sworn, I have no doubt, as at present advised, that there would have been a mistrial. It might have been prudent on the prisoner's part to have protested, or to have urged that, according to the very terms of the judgment given, Sparks should be directed to stand aside until the time should arrive when his challenge for cause should be tried; but what he did was to exercise the right of peremptory challenge, thus destroying the right to challenge for cause, because, according to the established practice, Sparks would not be called again.

As it appears by the record that the prisoner, in addition

to the peremptory challenge to Sparks, had peremptorily challenged nineteen other jurors, in my opinion the error secondly assigned is not sustained, and Hodgins was properly sworn upon the jury.

It is to be observed that after the twenty peremptory challenges (including that to Sparks) had been taken, and before the name of Hodgins was called, the prisoner challenged George Cavanagh for cause ; that the challenge was allowed, triers were appointed, and Cavanagh, being found indifferent, was sworn on the jury. If the judgment of the Court was, as the error first assigned asserts, and as has been argued by the prisoner's Counsel, an absolute final disallowance of the right of challenge for cause because the twenty peremptory challenges had not all been taken, then either the prisoner by this challenge recognized as a fact (what in my opinion the record shews) that he had challenged Sparks peremptorily, and therefore was entitled to challenge for cause, or it shews that, acting no longer "in deference to the said judgment," he sought to bring up again the very question which he contends had been decided ; while the admission of this challenge for cause shews, that in the judgment of the court the right of peremptory challenge being exhausted, no further directing jurors to stand aside could take place. Every juror thenceforth called must, if challenged either for the Crown or the prisoner, be challenged for cause, and be sworn or rejected according to the determination of the truth and sufficiency of the cause assigned.

That a party to a civil cause may, by his own conduct, deprive himself of taking advantage of manifest error on a record, appears by the two cases of *Strother v. Hutchinson* (4 Bing. N. C. 83), and *Corsar v. Reed et al.* (17 Q. B. 540). In the former, judgment had been entered against the plaintiff upon nonsuit, though the plaintiff appeared, answered when he was called, and refused to be nonsuited. The Court of Common Pleas reversed the judgment. In the latter, it appeared that the plaintiffs had submitted to the nonsuit, for the record shewed this, and the bill of excep-

tions said nothing to contradict the alleged submission, which in *Strother v. Hutchinson* was distinctly shewn; and the Court held that after submitting to be non-suited, instead of appearing and insisting upon going to the jury, the plaintiffs could not maintain error. Again, on an indictment for conspiracy, it was held that the defendant waived an objection, that there was a discontinuance in the jury process, by afterwards withdrawing his plea of not guilty, and pleading guilty—*Wright v. The Queen* (14 Q. B. 148.)

The recent case of *The Queen v. Mulcahy* (Ir. Law Rep. 1 Q. B. 12, and L. R. 3 H. L. 306), cannot, however, be passed without notice. Mulcahy was tried in Ireland for treason-felony. He challenged J. B., one of the jurors, for cause, that he was not a person between the age of twenty-one and sixty years—a statute requiring as one of the qualifications of a juror that his age should be between those years. The Attorney General demurred, and judgment was given against the prisoner, who immediately challenged J. B. peremptorily. A challenge to another juror upon a different ground was also, upon counterplea and demurrer, disallowed. Objections were also raised to the manner in which the offence was charged in the indictment. The case was taken by writ of error into the Queen's Bench in Ireland, and the judgment was affirmed. It was then carried to the House of Lords, and there the judgment was affirmed in all respects. That case resembles the one before us in these particulars—that there was a challenge for cause which gave rise to a demurrer: that the challenge was disallowed, and that the prisoner thereupon peremptorily challenged the juror, who in consequence was not sworn. It differs from the present case in this—that the judgment was, for all purposes of the trial, final; and that the prisoner had not exhausted his right of peremptory challenge when a full jury was sworn. O'Brien, J., differed from the rest of the Court, holding that the challenge should be allowed, and remarked that it had been suggested that, supposing the challenge should have been held good on demurrer,



still the allowance of the demurrer could not be relied upon as error, inasmuch as the prisoner, after that allowance, challenged the juror peremptorily, and he was not sworn, and the prisoner had not exhausted his peremptory challenges before a full jury was sworn; and the learned Judge seems to me to have thought that, in the case suggested, the error would have been fatal. But Fitzgerald, J., said that the reason why the disallowance of a challenge (which is what the prisoner here asserts as his ground of complaint) is a ground of error, is because there has been a mistrial, "because an unqualified or incapacitated person was sworn on the jury;" and that the peremptory challenge made by the prisoner caused the particular juror to be set aside, "so that it happens that no improper person was put on the jury;" and adds, that as the prisoner's peremptory challenges were not exhausted, it must be assumed that the jury consisted of twelve able men, properly qualified.

I do not perceive why so much stress is laid on the fact that the prisoner had not exhausted his peremptory challenges, as the foundation in whole or in part of the assumption just stated as to the composition of the jury. He did not require the right of peremptory challenge in order to sustain a legal cause of objection to any juror; as to others, against whom no such cause existed, there could be no assumption that they were not able or properly qualified, because the prisoner had gone as far as the law permitted in the exercise of what may frequently amount to no more than an unreasoning caprice.

But the observation that no improper person, no juror against whom a good cause of challenge existed, was sworn on the jury, is applicable to our case as much as to that above cited. Sparks was not on the jury, and the challenge to Hodgins was not for cause, and may have been made for no reason but to raise the legal question; and the verdict by a jury none of whom was disqualified supports the judgment on *the indictment*, even although the judgment on the demurrer had gone the length of disallowing the challenge against Sparks altogether. And it

is upon this consideration, taken in connection with the doctrine of *Strother v. Hutchinson*, *Corsar v. Reed*, and *Regina v. Wright*, that I ground the conclusion that the prisoner, by his own act in taking a peremptory challenge to Sparks, abandoned the challenge for cause; and this whether the decision of the demurrer was an absolute disallowance of the challenge, or amounted only to putting it off until all the peremptory challenges were exhausted.

Several American decisions have also been referred to. It is clear from them that different opinions on the question now before us have, and for all we know to the contrary still do prevail in different States. For example, the case of *Freeman v. The People* (4 Denio 31), supports the conclusion at which I have arrived, while *Lithgow v. The Commonwealth* (2 Virginia Cases 297), goes the other way. I acknowledge, with great satisfaction, the valuable aid I have frequently derived from the decisions of eminent jurists who have presided in the American Courts; and in cases arising out of incidents and circumstances peculiar to a newly-settled country like this Province, I have found help from their judgments which I could not obtain from any English authorities. But on the questions now under our consideration, it has appeared to me, from the American cases at which I have looked, that their mode of dealing with them differs from ours. In some, it would seem that writs of error and bills of exceptions are more or less blended together, and I presume their law and practice has been settled (perhaps by statute) on a different base from ours. I do not, therefore, make use of any of them on the present occasion.

It is impossible not to observe that this case has created great interest outside the Courts, and among those who are altogether unfamiliar with the character of proceedings on writs of error. Such persons will feel a surprise, (quite natural in their position,) to find that the question of the prisoner's guilt or innocence has not entered into the discussions which have occupied us. That was to be decided by the jury, and we have their verdict, which has not been

moved against, as, had any sufficient grounds existed to afford a prospect of success, it might, according to our law, and most probably would have been. But on a writ of error such as this we are not permitted to deal with the *facts* of the case, any more than we are to deal in conjectures upon the motives which influenced the respective parties in the different steps they took on their respective sides, either at or since the trial, or on the probable consequences of what they have done or have left undone. We are to look on the record to see what has been done by the parties, and what has been adjudicated by the court. For this court the record contains the whole case, and unless there be manifest error in the matter of law on the face of the record, it is our duty to affirm the judgment. If such matter be found, it is equally our duty to reverse it. I confess that, before I had carefully examined the record, my earliest impressions would have led me to adopt the conclusion of my learned brother Morrison, who dissented from the opinion of the majority of the Court of Queen's Bench; but now, after a long and very anxious consideration, I have arrived at a different result.

I am of opinion the judgment should be affirmed.

While I regret the difference of opinion that exists among us, I may remark that in *Regina v. Mellor* (4 Jur. N. S. 214, 1 Dears. & B. 468), seven Judges were of opinion that the matter was not a question of law arising at the trial, and therefore the Court of Criminal Appeal had no jurisdiction. Six (Cockburn, C. J., *dubitante*), thought there had been a mistrial, and (*dubitantibus* Coleridge J. and Martin, B.) that the proper course was to grant a *Venire de Novo*; and four judges were of opinion there had been no mistrial. The conviction, which, like the present, was for murder, was affirmed (*a.*)

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(a) It may be interesting to note here some other remarkable instances of judicial conflict of opinion:

In *Denn dem Mellor v. Moor*, 1 B. & P. 558, the judgment of the King's Bench was reversed in the Exchequer Chamber, and afterwards, 2 B. & P. 247, this latter judgment was reversed, and that of the King's

RICHARDS, C. J.—I have little to add to what I have said on this matter in the Court below. I think the judgment of the Irish Court of Queen's Bench in Mulcahy's case rather supports than militates against the judgment

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Bench established; there being no difference of opinion in either of the three courts.

In *Rex v. Fletcher*, Russ. & Ry. 58, six of the twelve judges thought that the award of dissection and anatomising was, under 25 Geo. II. ch 37, an essential part of the sentence for murder, while six thought otherwise.

In *Robinson v. Marquis of Bristol*, 11 C. B. 241, the unanimous judgment of the Common Pleas was reversed, on error, by the unanimous judgment of the Exchequer Chamber.

*Hickman v. Cox*, is, of late years, perhaps, the most remarkable instance of what Lord Campbell, in 9 C. B. N. S. 101, termed a "marvellous diversity of opinion among the judges." In the Common Pleas, 18 C. B. 617, it was unanimously decided that creditors executing a certain deed became partners in the business carried on under it, and thus liable upon certain bills of exchange. In the Exchequer Chamber, 3 C. B. N. S. 523, Coleridge, Erle, and Crompton, JJ., concurred in this opinion; while Martin, Bramwell, and Watson, BB., held otherwise; so that the judgment of the Common Pleas so far remained undisturbed. On appeal to the House of Lords, 9 C. B. N. S. 47, upon the question being propounded to the Judges, Blackburn, J., Crompton, J., and Williams, J., were of opinion that defendants were liable; Channell, B. Wightman, J., and Pollock, C. B., that they were not; and the House having adjourned to consider these opinions, Lords Campbell, Brougham, Cranworth, Wensleydale, and Chelmsford, were unanimous in favor of the defendants.

In *Jefferies v. Alexander*, 19 Beav. 436, 7 DeG. M. & G. 525, 8 H. L. Cas. 594, the Master of the Rolls held that a certain deed constituted a charge upon the chattels real of the covenantor. The Lords Justices, and Erle, and Wightman, JJ., who had been called in to their aid, reversed this decision. In the House of Lords the question was twice argued, the Law Lords present on the first occasion having been equally divided. On the second hearing, six of the Common Law Judges were present, and were also equally divided; and of the five Law Lords present, three thought it a charge on the realty, and two that it was not.

In *Billiter v. Young*, 6 E. & B. 1, 8 H. L. Cas. 682, the question was whether, under the circumstances, trover could be maintained. It was argued twice in the Queen's Bench, in error, on a Bill of Exceptions, and then in the House of Lords, where the Judges were called in. The opinions of no less than nineteen judges were thus taken, of whom ten thought that trover could not be maintained—(Parke, Williams, Crowder, Wightman, Crompton, Blackburn, Campbell, Chelmsford, Cranworth, and Brougham); and nine were of opinion that it could—(Jervis, Pollock, Coleridge, Martin, Alderson, Maule, Cresswell, Channell, and Platt). The action was first tried in 1853, and the result of this difference of opinion was, that in 1860 a *Venue de Novo* was awarded.

In *Hutchinson v. Copestake*, 8 C. B. N. S. 102, the C. P., upon a question as to the right to obstruct lights, followed the unanimous judgment of the Q. B. in *Renshaw v. Bean*, 18 Q. B. 112; and their judgment was affirmed in the Exchequer Chamber, 9 C. B. N. S. 863, there being no difference of opinion as to the result, though the Judges proceeded to some extent upon different grounds. In *Tapling v. Jones*, 11 H. L. Cas. 290, by a unanimous judgment, these three decisions were overruled.



in the Court below; for one of the Judges there in his judgment expresses views tending to affirm the judgment in this case, and although another of the Judges expressed an adverse opinion, the other Judges gave no opinion on the point, but decided against the prisoner on the main ground.

I will now read the substance of what I had written as the conclusion of my judgment in the Court below, which I thought it not desirable then to read, because it was probable the case would go into Appeal, and it might in that view possibly prejudice the prisoner's case :—

In conclusion, I may be permitted to state that from what occurred at the trial, and the statement made by the juror Sparks during the discussion of the question, I have no reason to suppose he ever did in fact state what was alleged against him in the challenge; nor do I think that the rejection of the challenge of the juror Hodgins prejudiced the prisoner, beyond that kind of prejudice which a prisoner may be supposed to receive from not being able to exercise a strictly legal right, if he had such right, his challenge having in fact been made, as I understand it, merely to raise the question as to the correctness of the ruling of the Court in relation to the challenge of Sparks.

The prisoner himself, in some remarks made by him at the conclusion of the trial, admitted that under the evidence the jury could not be expected to find any other verdict; and if the fullest liberty of challenge had been given, there is no probable ground for supposing the verdict would have been different.

HAGARTY, C. J. C. P.—Much discussion has taken place as to the manner in which the alleged errors are stated on the record. I think it right to state how I consider the question to have arisen.

After twelve peremptory challenges the juror Sparks is called, and is challenged by the prisoner for cause, as not

being indifferent, in this, that he had said if he were on the prisoner's jury he would hang him.

The Attorney General answers or counter-pleads to this challenge, that the prisoner is not now entitled to challenge Sparks for favor, in this, that he has not exhausted his twenty peremptory challenges, only twelve jurors having been challenged by him peremptorily. The prisoner demurs to this answer as not sufficient in law.

Judgment was given against the prisoner on the demurrer. The words used by the Chief Justice are (perhaps unnecessarily) set out.

It was warmly argued for the prisoner that the Court directed his challenge to stand as a peremptory challenge, and not as a challenge for cause, and that in fact it was the act of the Court alone that made it a peremptory challenge. For the Crown it was insisted that both parties, yielding to the judgment, accepted and took the challenge as peremptory on the prisoner's part.

The legal effect, at all events, may be thus stated:—

That the Court decided on the demurrer that until the peremptory challenges were exhausted the prisoner could not challenge for cause; and thereupon, in consequence of such judgment, the prisoner peremptorily challenged Sparks, who did not sit on the jury.

Several other peremptory challenges were made by the prisoner and allowed, completing his twenty. He then challenged Cavanagh for cause, but he was found indifferent by the triers, and sworn. He then challenged Hodgins peremptorily, on the ground of his previous challenge of Sparks, for cause, being taken and treated as a peremptory challenge, and that he was required to challenge him peremptorily if he desired to exclude him. This, on objection by the Crown, on the ground of his having already challenged twenty jurors, including Sparks, peremptorily, was disallowed by the Court, and Hodgins was sworn upon the jury.

It is now conceded that the decision as to Sparks was erroneous, and that the prisoner's challenge for cause should have been tried in the usual way.

It is also fully conceded that if Sparks had been sworn on the jury there would have been a mis-trial, and a *Venire de Novo* must have been awarded. But it is contended with great force that, as the prisoner elected to challenge him peremptorily and exclude him from the jury, the error is cured. It is also questioned if it be a good ground for error.

I give my opinion with most sincere diffidence. In this country we have had but little if any experience in such matters. I have no recollection, during a connection of nearly thirty years with the Canadian Courts, of any question concerning a challenge of jurors in criminal cases having arisen.

I think it is a matter properly examinable in error, and that it is brought before us with sufficient distinctness. It is true that the judgment was not absolutely on the sufficiency of the grounds of challenge, but that those grounds could not at that stage support the challenge. Had the Court directed Sparks to stand aside for the time, till it was ascertained if a jury could be obtained, the difficulty might not have arisen. But this was not done. Judgment was given, so that it became necessary either to challenge Sparks peremptorily or let him be sworn.

In the very able argument for the Crown it was succinctly pressed upon us, that, as to Sparks, the prisoner by his own act excluded him from the jury, and so cured all error; and as to Hodgins, that the prisoner had already had his twenty peremptory challenges.

This formula, if sound, offers a very easy solution of the difficulty. I much regret to say that it does not fully satisfy my mind. I am not prepared to hold that the prisoner must let the obnoxious juror go upon the jury, or lose absolutely the right to object to the judgment. If this be the law, it seems to me to work a serious injustice, for which there is no adequate remedy.

It is easy to say that the prisoner and his counsel must be assumed to know the law, and that they should have let Sparks be sworn, knowing that it would be the ground of a *Venire de Novo*.

Many formidable considerations may press on counsel's mind at such a time. By the decision he must either throw away a peremptory challenge, reserved for other jurors, or let the obnoxious juror be sworn. This may occur with one, five, ten, or twenty jurors, all of whom he desired to challenge for cause. He knows or suspects them to be adverse to him, and if he allow them to be sworn, he may reasonably look forward, in a nicely balanced case, to a hostile verdict. He may have strong expectations of being able to set such verdict aside, but he knows well the formidable effect of a preceding adverse verdict in a capital case, depending possibly on indirect or circumstantial evidence. So he is forced to elect between two embarrassing courses. Without speculating too freely on the possible prejudice of such an embarrassment to a man standing on his life, I see much matter of grave import to make me pause before deciding that he must elect at his peril.

It is quite clear that he might have to exhaust his twenty peremptory challenges in this way on jurors to whom he had good cause of objection, and from whose known hostility he might strongly dread a conviction. This would leave him defenceless against the residue, whom he might not be able to prove indifferent. I think this is a most serious dilemma for a prisoner on a capital charge. When Sparks was called he had, by law, two means of excluding him. If the first failed he could still resort to the second. I cannot divest my mind of the idea that he has been erroneously deprived of one of these two legal protections.

If the peremptory challenge of Sparks, and his consequent exclusion from the jury, cured and blotted out the previous error, it is very difficult to understand the account of the case of *Mulcahy v. The Queen*, in Error, first in the Irish Courts, (Ir. L. R. 1 Q. B. 12) and again in the House of Lords, (L. R. 3 H. L. 306.)

There two jurors were challenged for cause, the challenges disallowed on demurrer, and then they were excluded by peremptory challenges. This disallowance



was assigned as error, besides a disallowance of challenge to the array, and judgment on demurrer to the indictment.

All the errors were argued at length. It appeared that the prisoner had not exhausted his peremptory challenges, having only used eighteen of them. This is noticed at page 60 : " This point was not relied on by the Crown Counsel; and Mr. Lawson, in his reply for the Crown, conceded that the Court should now decide the question of error according to what in their opinion should have been the decision of the Court below at the time the challenge was taken." These words are from the judgment of O'Brien, J., who notices the suggestion of Fitzgerald, J., " that, even supposing the challenge for cause to the juror Booth should have been held good upon demurrer, still the allowance of the demurrer cannot now be relied on as cause of error, inasmuch as Mr. Booth was peremptorily challenged by the prisoner after the allowance of the demurrer, and was not sworn on the jury ; and inasmuch as the full number of peremptory challenges to which the prisoner was entitled was not exhausted before a full jury was sworn." The learned Judge differed from his brethren, and held that the challenge was improperly disallowed, although he held all the other objections of the prisoner as of no avail, and he held " that there is error in the proceedings, by reason of the allowance of the demurrer to the challenge taken to Mr. Booth ; and that therefore a *Venire de Novo* should be awarded." Fitzgerald, J., agreed with the rest of the Court on all points against the prisoner. He says ; " There is a matter to which I wish to call attention again, although pronouncing no judgment. In the course of the argument a difficulty pressed me in reference to the two challenges, which I stated to Counsel. The illegal disallowance of a challenge is a ground of error, to be remedied by a *Venire de Novo*. But why ? Because there has been a mistrial, because an unqualified or incapacitated person was sworn on the jury. In the particular case before us, immediately after judgment was given on the challenges, the prisoner challenged the jurors peremptorily, and they

were set aside ; so that it happens that no improper person was put on the jury ; *and, as the prisoner's peremptory challenges were not exhausted, we must assume that the jury consisted of twelve able men, properly qualified.* I suggested whether by this course there had not been an abandonment of the preceding challenges, or at least whether a course had not been taken which prevented the prisoner from relying on the disallowance of the challenges as ground of error. The answer given to the suggestion was, that our judgment must be given now as it ought to have been given at the time of the challenge below ; if so, what would be the result ? That Henry Fry and James Booth ought to have been excluded. Well, they have been excluded. Where now is the error on the record, or where the ground for a *Venire de Novo* ? I cannot see it at this moment. I merely now wish to say that my mind is not satisfied on this point. If the prisoner intended to rely on the challenges, he should have allowed the jurors to be sworn ; and then, if he was right in his law on the challenge, he would have had a *Venire de Novo*. I concur in the judgment of the Court upon all the three questions raised on which it is necessary for us to decide." One of these was the challenge question. No other member of the Court refers to this suggestion of the error having been cured or abandoned, but each proceeds to discuss at length the goodness of the challenge and decide in favor of the Crown.

The case is carried to the Lords, and the same grounds of error are reargued. After argument, Lord Cairns, C., proposed certain questions to the Judges : 1. Ought the challenge to James Booth upon the ground of age to have been allowed ? Then, 2 and 3, on the other errors ; Lastly. Ought judgment to have been given upon the whole record, or any part thereof, for the plaintiff in error ? Mr. Justice Willes delivered the opinion of the Judges. He reported their opinion that the challenge was properly disallowed, giving reasons ; and after going over all the alleged errors, and holding them insufficient, he answers

that the Judges are of opinion "that judgment ought not to have been given upon the whole record, or any part thereof, for the plaintiff in error." The Law Lords then reviewed the objections seriatim, and fully adopted the Judges' conclusions, all agreeing that the challenge to Booth on account of age was properly overruled. If the ruling on Booth's challenge was rendered unimportant by the subsequent peremptory challenge, I cannot see why the law on the subject was so elaborately examined in the Irish and English Courts. It has been suggested that the Crown did not press the objection that the prisoner had cured the error, if error there had been. But the Crown cannot, it is said, confess error, and the Court must give the right legal judgment. Now if it had held that the challenge for cause to Booth was improperly disallowed, what would the judgment have been on the writ of error? The Judge who held that it should have been allowed, considered that therefore there must be a *Venire de Novo*. Had his brethren been of the same opinion as to the challenge, they must have considered whether Booth's exclusion by the prisoner's peremptory challenge did not cure the error. If, as is here urged, the error, if any, was wholly blotted out and cured, it was idle to have discussed the merits of the challenge, as there was no error in that respect on the record. The point was not overlooked; it is referred to by O'Brien and Fitzgerald, JJ. Both of them seem to make it an important part of their view of the case that Mulcahy had not exhausted his peremptory challenges, and therefore they assumed "that the jury consisted of twelve able men, properly qualified."

In the case in judgment, it is conceded the decision on the demurrer was erroneous. If we hold therefore there is still no error on the record, it must be on the ground that the prisoner cured the error by his peremptory challenge. I do not raise any question as to the language used—whether it imports, as was suggested, that this challenge for cause was not by his act, but by the act of the Court, ordered to stand as a peremptory challenge. Nor do I see

any difficulty in the statement that the challenge was taken and treated by the prisoner and the Attorney General as a peremptory challenge. My opinion rests on just such a state of facts as in *Mulcahy's* case, that thereupon, or in consequence of the decision on the demurrer, the prisoner peremptorily challenged Sparks, and that afterwards, his twenty peremptory challenges being exhausted, he challenged Hodgins. The decision of the Court in disallowing Hodgins' challenge necessarily followed the previous proceedings. This latter challenge only becomes important as illustrating the position in which the prisoner was placed by the previous ruling, that he was entitled to twenty peremptory challenges and one for cause, and that he lost his challenge for cause, which was to his prejudice converted into a peremptory challenge.

It appears to me that if we hold the record here to be free of error, we sanction a course of proceeding that might be most prejudicial to a prisoner in his full and free defence. It matters not to our judgment whether the verdict might or might not have been the same if this unfortunate question had never arisen. As was said by Willes, J., in *Irwin v. Sir George Grey*, on a writ of error, (19 C. B. N. S. 604, L. R. I. C. P. 171, and L. R. 2 E. & I. App. H. L. 20). "In this form of proceeding we must decide aye or no whether there be ground of error; and, if there be, we have no alternative, but must reverse the judgment, though no injustice appears to have been done, and even if we should be of opinion that there is no cause of action upon the record."

This is a question which naturally recalls the oft quoted words of Sir J. Coleridge, cited by Lord Denman, in *O'Connell v. The Queen* (11 C. & F. 353), "All questions touching the formation of juries must be examined by the Judges with very critical eyes." I certainly have no desire, in this or any other case, to be hypercritical in discussing objections to the conduct of a trial.

I have already pointed out the substantial ground on which, in my opinion, some of the prisoner's points rest. I



think we must pronounce now the judgment which ought to have been pronounced in the Court below when the challenge for cause was offered, and that nothing done by the prisoner has, under the circumstances, cured or removed the error.

I do not feel pressed by the suggestion, that our giving the judgment which the Court below ought to have given would not alter the state of facts at the trial, as Sparks was, in fact, excluded from the jury. The right judgment below would have left Sparks' un-indifference to be settled by the triers, who might have found against him, and the prisoner would have had his second remedy left to be used on some other juror. I think, with much submission to those who differ from my conclusion, that a substantial wrong is done to a prisoner by taking away his first legal objection, and compelling him, in self defence, to resort to his second or peremptory right. I think it a misconception to treat the error as blotted out by the prisoner's alleged voluntary act—the substantial error being, as I consider it, the deprivation of one of two legal rights. Although the decision was in one sense of a temporary character, as to the insufficiency of the challenge at that time, and might have been cured by directing the juror to stand by, its effect was final in its result, just as if it had been an absolute disallowance on the merits.

I have arrived at the conclusion that there must be a *Venire de Novo*. I see no other way by which, in the formal language of the record, the prisoner, can "be restored to all that he hath lost by the occasion of the said judgment."

VANKOUGHNET, C.—I concur with those members of the Court who have expressed themselves in favour of awarding a *Venire de Novo*; and as I was aware that they had prepared lengthy and exhaustive opinions on the subject, I have not thought it necessary to inflict upon the public or the reporter a written judgment of my own.

The case shortly presents itself to my mind in this view :

—When Sparks, the juror, was called to be sworn, the prisoner said to the Court, “I desire to exclude this man from the jury, and I challenge him for cause.” The Court said, “I refuse you this right, but I accept the challenge as a peremptory challenge.” The prisoner answered, “If you drive me to that alternative, I challenge peremptorily, rather than that Sparks should go on the jury.” It seems to me that in forcing this alternative upon the prisoner there was error.

SPRAGGE, V. C.—The case presents itself to my mind in this way :—The prisoner challenged Sparks for cause ; to this challenge the Crown objected that the twenty peremptory challenges must first be exhausted ; to this the prisoner demurred, and his demurrer was overruled ; the overruling of the demurrer was error.

The matter is before this Court upon error. The question is simply whether there is error upon the record. If it were an application for a new trial, it would be open to other considerations—*e. g.*, on the one hand, whether there had been hardship or disadvantage to the prisoner ; on the other, whether the Court might not look at the evidence, as in civil cases, to see whether there was not ample evidence to sustain the conviction. Such application would be to the judicial discretion of the Court. As it is, error or no error upon the record is the only question.

The first point established is, that the overruling of the demurrer was an erroneous ruling—the error consisting in a ruling adverse to the prisoner upon a point as to the composition of the jury, upon which point the prisoner was right.

Next, does it appear upon the record that Sparks was, as a matter of fact, challenged peremptorily by the prisoner ?

What does appear is that the prisoner challenged him for cause, and that that challenge was in effect disallowed ; and that he was not sworn. The record, leaving out the superfluous words, states that “thereupon,” *i. e.*, upon the prisoner’s demurrer being overruled by the Court, “the

said challenge is accordingly taken and treated by the said Patrick James Whelan and the said Attorney-General as a peremptory challenge for and on behalf of the said Patrick James Whelan ; and the said Jonathan Sparks is thereupon not sworn upon the said jury."

Counsel for the Crown read the word "taken" as applied to a peremptory challenge: that the prisoner, upon his challenge for cause being disallowed, "took" a peremptory challenge; but that is not the allegation. The word "taken" is applied to the challenge for cause; and the allegation is that that challenge was "taken and treated" as a peremptory challenge. What passed we do not know, except from the words of the record, and that does not inform us with any distinctness. Upon the disallowance of the challenge for cause, it was open to the prisoner to do either of two things—to allow Sparks to go upon the jury, or to challenge him peremptorily. If he had, as a distinct act, challenged him peremptorily, it would, we must infer, have been so stated upon the record. The inference is that he did not make a peremptory challenge, and this is apparent, not only from the absence of allegation that he did so challenge, but from the form of the allegation that is made, namely, that the prisoner's challenge for cause was "taken *and treated*" as a peremptory challenge; *i. e.*, literally taken and treated as something that it was not. How this was done the record does not inform us; but by the prisoner as well as the Attorney General the challenge for cause was so taken and treated.

I find it difficult to conceive what did pass,—whether it was taken for granted that the challenge for cause should stand as a peremptory challenge, or whether the prisoner consented that it should so stand. That the one should stand for the other was probably understood, but still the difficulty remains, what *was done*. If the prisoner in express terms consented that the challenge he had made should be taken as a peremptory challenge, that might itself be tantamount to a peremptory challenge; it would perhaps be just a roundabout way of saying that, his

challenge for cause failing, he chose to challenge peremptorily rather than that Sparks should be upon his jury. But if this had passed he would probably have been asked if he was to be understood as making a challenge peremptorily, and upon his answer in the affirmative, the record would be that he had so challenged; or, if his express consent that his challenge for cause should be taken as a peremptory challenge could be held tantamount to a peremptory challenge, then I apprehend that the entry upon the record would state it as a peremptory challenge.

I think the proper inference is that there was no peremptory challenge in terms, and that there was nothing upon which the record could state that there was such challenge—nothing from which more could be stated than that the challenge for cause was by the prisoner and the Attorney General taken and treated as being, or as having been, a peremptory challenge. This is very material, for unless there was an actual peremptory challenge of Sparks, the prisoner's challenge of him cannot be counted as one of the twenty, and it was error to disallow his challenge of Hodgins. I think it right to express my doubts upon this point, though I believe they are not shared by the majority of the Court.

The next point is, what was decided by the overruling of the demurrer arising out of the challenge of Sparks. Only this, certainly, that the prisoner could not, at that time, challenge for cause. The *truth* of the cause for which Sparks was challenged was not decided; the sufficiency of the cause may be taken as decided. If not sufficient, the Crown could properly have demurred to the challenge; that course, as well as the one taken, was open to the Crown. At any rate, the cause was undoubtedly sufficient.

We must look now at the matter as it then stood. Suppose the demurrer had been allowed, as it should have been, the *fact* of the cause of challenge would have been tried, with what result we cannot say. If not established, the prisoner



would have been in the same position as he was in by the overruling of the demurrer, with, however, this difference, that he would have had the light of the evidence to guide his judgment, and would have felt more safe in allowing the juror to be upon the jury than he could have been in the circumstances in which he was placed, and he might have reserved his peremptory challenge for other jurors—*e. g.*, for Hodgins. This is, besides, the effect it may have had, and would naturally have, upon his challenging others for cause, and perhaps also upon his challenging peremptorily, in order to exhaust his peremptory challenges so as to get at his challenges for cause.

We cannot tell how much the composition of the jury was affected by the ruling of the Court, even upon the hypothesis of the fact of the cause for which Sparks was challenged failing to be proved. Again, on the other hand, suppose the fact proved; the prisoner's peremptory challenge of Hodgins would have been good, and so the jury would have been differently composed. In the latter event, we must take it that the necessary consequence of the ruling of the Court was, that a juror objected to by the prisoner was on the jury, who upon a right ruling would not have been upon the jury. Upon the other hypothesis there would also be a necessary consequence, consisting of what I have pointed out, in the different position of the prisoner, his having what by the ruling of the Court he was deprived of, the means of judging of the course that it was for his interest to pursue in regard to Sparks, and the pressure that was put upon him by the ruling of the court in the exercise of his judgment in regard to subsequent challenges.

To take the rule then in its strictest sense—that, seeing that there has been error, it must also be seen that that error was to the detriment of the prisoner—does it not appear to have been so, whether the fact upon which the challenge of Sparks was grounded, was well founded or not? We assume nothing in favor of the prisoner, and, on the other hand, we can assume nothing against him. We

cannot assume that when he stated his ground for his challenge he did not believe it to be true. Again, we cannot assume that it was not true. He was denied the right of giving evidence in proof of its truth. That was error. If the necessary consequence of that error was to prejudice the prisoner in any way in his rights in regard to the composition of the jury, it is brought within the rule. His right was to have the truth of his allegation tried. A trial would have disclosed that his belief in the ground of his challenge was either well or ill founded. It cannot be said that the knowledge of the fact, whatever it was, was immaterial to him. It cannot be said, on the one hand, that the evidence would not have established the fact; or, on the other hand, that it would not have convinced the prisoner that he had been misinformed—that it would not have removed his apprehension that Sparks was prejudiced against him; and have induced him to allow Sparks to go upon the jury, as he allowed Cavanagh to go upon the jury after challenging him for cause, and after triers had decided against the fact upon which the prisoner had challenged him; upon this he made no peremptory challenge, and without further objection the juror was sworn. He was forced to act without this information; the withholding of it was the direct consequence of the error; and the information was material to him. We are not to judge over nicely as to *the extent* to which the prisoner was prejudiced by the error. So long as he was prejudiced, not colorably or fancifully, but actually, whether in a great or small degree, it is sufficient.

I cannot myself see that there was any waiver or abandonment on the part of the prisoner. In considering these questions a Court must always look at the position of the parties. A party is not held to any waiver or abandonment which he makes under the pressure of duress; and it would be unjust to him if he were. Nor was there, in my judgment, any acquiescence on the part of the prisoner. A party is not held to his acquiescence in any infraction or withholding of his rights, when he acquiesces in ignorance

of what his rights really are. In this case that doctrine would apply emphatically. Could it be said that the prisoner knew, or that he must be taken to have known, that it was his right to challenge for cause, when that point had just been solemnly adjudicated against him? Again waiver, abandonment, and acquiescence, all suppose the existence and exercise of free will. In this case there was no room for the exercise of free will. There was no *express* waiver, abandonment, or acquiescence, and there was nothing in the course taken by the prisoner from which any one of them can arise, as a matter of necessary implication. On the contrary, the circumstances under which the prisoner took the course he did take were such as, in my opinion, to *exclude* any such implication. Further, it was not necessary, in my judgment, that the prisoner should protest against the judgment of the Court, in order to preserve his right to object to it afterwards if erroneous. He and the learned counsel who defended him may well be excused if, at the time, they thought the judgment to be right in law. But, at any rate, I know of no rule or principle which excludes a man from the assertion of his rights only because, upon their being overruled upon a previous occasion, he had omitted to protest against the judgment that overruled them.

I think it is no answer to the prisoner's case that he objected to Sparks being upon the jury, and that Sparks was not upon the jury. His objection was not pure and simple to Sparks being upon his jury, but that for a cause which he assigned Sparks ought not to be upon his jury; that *cause* was excluded from consideration; and his being afterwards excluded from the jury by the act of the prisoner in the exercise of a right *other* than that denied to him, can be no answer to the case of the prisoner unless it be shewn, which it cannot, that his position was not prejudiced by the denial of his right.

Neither do I think the prisoner's case is answered by saying that his proper course was to allow Sparks to go upon the jury. It is true that, upon the present ruling of what the law is upon the point ruled against him at the

trial, he might safely have disregarded that ruling, and he would have been placed in a position of advantage by doing so. His position in that case would have been clear *now*, though purchased at a risk which it may be supposed that neither he nor his counsel thought it prudent to assume. But, though he *might* have taken that course, the case he presents is not weakened by his taking another, if upon that other he can shew that there was error in the proceedings taken against him. This is so obvious that the bare statement of it is sufficient.

It is further said, as a reason for affirming the judgment of the Court of Queen's Bench, that upon the ruling of the Court at the trial certain alternatives were open to the prisoner:—that he might have allowed Sparks to go upon the jury, or he might have challenged him peremptorily, or he might have rested upon a simple protest, leaving it to the Crown to take its own course, to order that Sparks should stand aside or to let him be sworn; and it is said that his peremptory challenge was an *election* on his part to take one of the alternatives presented to him; and that, having taken that course, he is barred now from complaining of the ruling at his trial. With very sincere deference to the members of the Court who adopt this reasoning, I am obliged to say that I cannot concur in it or see its force. But for the ruling of the Court, now adjudged to be erroneous, he would have had another alternative; his right of election would have extended to one other course besides those which have been enumerated; and from that other course he was debarred by the ruling of the Court. It is no answer to him that he had three alternatives left, when but for that ruling he would have had four. Or, putting out of the case the protest which in that case would not have arisen, he would have had three alternatives, or three courses open to him, whereas upon the ruling of the Court he had but two. I cannot come to the conclusion that his taking one of those two is an election, which can affect his right to complain of his being debarred from the third.



For these reasons I think that the prisoner's case in error is sustained, and that there should be a *Venire de Novo*.

MORRISON, J.—After hearing the case again argued, and after giving it all the attention I could, I have been unable to come to a different conclusion from that which I arrived at in the Court below.

The errors assigned are somewhat different from those assigned in that Court, and the argument has proceeded to some extent on different grounds; but the case, I may say, is reduced to a single point—whether the prisoner by election, waiver, acquiescence, or abandonment, or whatever term may be applied, has deprived himself of the right of now excepting to the decision of the learned Chief Justice.

It was pressed by the counsel for the Crown that we should only look at the legal result of that decision, and which was contended, as I understand the argument, to be merely the over-ruling the challenge for favor to Sparks: that the subsequent proceeding, the peremptory challenge to that juror and his rejection, was the deliberate act of the prisoner: that no injury was done to him: that the prisoner's resorting to the use of a peremptory challenge was not the legal result of the erroneous ruling, although it might be the resulting effect, and that, therefore, the first ground of error was not sustained; and, as a sequence, the remaining error assigned failed, as the prisoner had, including his alleged peremptory challenge to Sparks, exhausted his twenty peremptory challenges before he challenged the juror Hodgins. This view of the case was very skilfully and ably put and argued, but in my opinion the reasoning is unsound, the grounds upon which it is predicated being deducible from the matters and proceedings appearing on the record.

It was also urged that some of the entries that appear on the roll ought not to have been set out, and that no notice should have been taken of them. I do not think we can separate what has been termed the legal result from the

actual result of the ruling of the learned Chief Justice. The ruling had necessarily a prospective bearing, beyond the adjudication upon the challenge which it affected, for while it deprived the prisoner of one right it operated upon another. I do not feel myself at liberty to strike out or reject as surplusage any portion of the entries, rulings or judgments spread out on the record. What appears on the roll was entered under the direction of the Court, with, no doubt, an anxious desire of giving to the Crown and the prisoner the full benefit of the decision, and as a record of what actually took place. I am unable to separate the rulings upon the respective challenges to the jurors Sparks and Hodgins, neither can I dismiss from my mind the complex character of the ruling upon the challenge to Sparks, its import, and its immediate and consequential operation. The two challenges are so connected, that I can hardly express an opinion on the one without considering the other. Upon *in nullo est erratum* pleaded, all the facts and proceedings set out are admitted. Whether those matters are properly there, is not, in my opinion, a question for determination, and however embarrassing the language may be, our duty is to deal with it as it is, and if error is manifest on the whole record, to reverse the judgment. No intendment ought to be made against the prisoner, and in a case of this nature, where the consequences are so momentous, I would be most unwilling to strain doubtful language, or to proceed upon mere verbal distinctions. Whatever view is taken of the record, one pressing difficulty underlies the whole case, and stands in the way of the Crown, the overruling of the challenge to Sparks for favor—in other words, the deprivation by the Court of the prisoner's right of rejecting that juror for the cause assigned—for if the prisoner had been permitted the exercise of his right to prove the un-indifference of Sparks, the juror Hodgins might not have been sworn on his jury. All this is apparent on the record.

The difficulty in the case is much increased from the record not expressing or shewing in exact or unambiguous

terms the rulings and proceedings, and the course adopted by the prisoner.

As I read it, the Court decided that the prisoner was not entitled to challenge Sparks for cause : that his challenge for favor was good as a peremptory challenge, and that in the event of the prisoner's twenty peremptory challenges, including the challenge then under discussion, being exhausted, then in such case such challenge was to be considered a peremptory challenge, and not for cause ; and such, I think, would be the necessary result of the learned Chief Justice's ruling, for by it no challenge for favor could be allowed until the peremptory challenges were exhausted. In other terms—all such challenges, however taken or made, would be considered, if persisted in, as peremptory challenges. Then the roll shews the result of the decision:—and thereupon, in deference, that is, in submission to the ruling of the Court, the said challenge (for cause) is accordingly taken and treated by the prisoner and the Attorney General as a peremptory challenge, &c. It appears to me no option was given to the prisoner, for no matter how clearly a juror was rejectable for favor, the challenge would only be considered as a peremptory one. The record does not state that the prisoner withdrew his challenge to Sparks for favour, or that he abandoned it, or of his own act peremptorily challenged Sparks, but it states that the challenge so made was accordingly, that is, in conformity or obedience to the judgment of the Court, taken and treated as a peremptory one.

It was, however, urged, that if the prisoner purposed to retain his right to except to the erroneous ruling, he should have formally protested against it, A protest in so many words does not appear on the record. But if we look at the subsequent proceedings in relation to the challenge to Hodgins, it is evident, so soon as the contingency happened by which the ruling became actually injurious to the prisoner, he at once reasserted his rights, so far negating any previous waiver, election, &c. But, be that as it may, considering the general principles applicable to cases of

felony, I have a strong opinion that, in order to keep alive a right to except to an erroneous ruling of a judge, a protest is quite unnecessary. It is not, so far as I am aware, the usual practice. The passage cited by Mr. Cameron from the judgment of Pollock, C. B., in the Privy Council, in *Beaudry v. Mayor of Montreal* (11 Moore. P. C. 426), is, I think, applicable, both as to protest and waiver. In referring to the appellant, the Chief Baron says: "He could do nothing more than he did; it was not his business to protest in Court, but respectfully to submit to a legal decision. \* \* Mere respectful acquiescence or submission to the ruling will not, we think, amount to a waiver."

I may here remark, that the Attorney General, in answer to the prisoner's claim to peremptorily challenge Hodgins, does not allege on the record any waiver, &c., on the part of the prisoner, but he alleges that after the disallowance of the challenge for favor to Sparks, he subsequently peremptorily challenged that juror. I do not see expressly stated any ground for that allegation on the part of the Crown; if any, it can only be implied by giving to the entry relating to that challenge the construction contended for.

With respect to the entry on the challenge to Hodgins, I must confess I have been unable to come to a satisfactory understanding of it. The prisoner alleges certain grounds for the allowance of the challenge, and the Attorney General in answer sets up a different state of facts against it. The judgment merely overrules the challenge; there is no regular traverse; and it is not clear upon what ground it is overruled. I am not prepared to acquiesce in the argument that the prisoner should have protested and permitted the juror Sparks to be sworn on his jury—in effect to have given up his defence, and relied on the error of the Court to avoid any conviction. Such a step would be a perilous one, and I doubt, except upon the strength of a decision beyond all question, that any counsel would take the grave responsibility of so advising. For myself, before depriving a prisoner on such grounds of a remedy for a wrong done him, I would require clear binding authority.



*Mulcahy v. The Queen* (Ir. L. R. 1 Q. B. 12,) and which afterwards went to the House of Lords (L. R. 3 H. L. 306) was not cited on the argument in the Court below. That case is the only one having any particular bearing on the question before us; and although no judgment was given on the point, yet I think it is evident from what fell from Fitzgerald, J., it is in favor of the prisoner. He says "The illegal disallowance of a challenge is a ground of error, to be remedied by a *Venire de Novo*. \* \* It happens that no improper person was put on the jury; and, as the prisoner's peremptory challenges were not exhausted, we must assume that the jury consisted of twelve able men, properly qualified." Here there is certainly an illegal disallowance of a challenge; the peremptory challenges were also exhausted; and the juror Hodgins was sworn on the jury notwithstanding the challenge of the prisoner, and who might have been rejected if the illegal ruling had not taken place. If the contention of the Crown is tenable, it seems to me singular that one of the principal questions arising in *Mulcahy's* case was not at once disposed of, on the ground that the jurors there were excluded from the jury, by the peremptory challenges of the prisoner.

For these reasons, in addition to the grounds upon which I dissented from the judgment of the Court below, I am of opinion that our judgment should be for the plaintiff in error; that the judgment of the Court of Queen's Bench should be reversed; and that a *Venire de Novo* should be awarded.

ADAM WILSON, J.—Since judgment was given in the Court below I have seen *Mulcahy's* case, and I have only to say it does not in my opinion affect the view which I then took and expressed.

The case of *Beaudry v. The Mayor of Montreal* (11 Moore, P. C. 399) was referred to in argument, and relied upon by the prisoner's counsel, for the purpose of proving that the taking and receiving by the prisoner and the Attorney General of the juror Sparks, as having been challenged

peremptorily by and on behalf of the prisoner, should not be considered as a waiver or abandonment of the previous challenge for cause, because, in the language of the case just mentioned, "it was not his" (Whelan's) "business to protest in Court, but respectfully to submit to a legal decision. In order to prove that he acquiesced, and waived his right to complain of an illegal decision, it ought to be shewn that he said or did something to give the court a jurisdiction which the Act in question did not give them. Mere respectful acquiescence or submission to the ruling of the Justices will not, we think, amount to a waiver."

The proceedings referred to were had before Justices of the Peace, acting under a special statute of Lower Canada, authorising them to assess compensation to owners of property, which was taken by the City of Montreal for objects of improvement; and these proceedings were brought in question by their removal into the Superior Court by certiorari, and, upon judgment there that the writ should be quashed, by their being carried by appeal to the Queen's Bench for Lower Canada.

These proceedings were therefore somewhat similar to a trial with us at Nisi Prius, moved against afterwards in full Court, and carried finally into appeal, where the matters and facts just as they were discussed in the Court below would be again discussed and reviewed in the Court of Appeal. But such proceedings have nothing of the character of matter of error, and must therefore be governed in a different manner.

In this case, according to the language quoted from, may it not also be said "that he" (Whelan) "said or did something," to deprive him of the right to complain? It appears to me, as I stated in the Court below, that he did, and in very plain and emphatic terms, and that he is now concluded from falling back upon an objection, which in my opinion he had so expressly given up.

The cases of *Strother v. Hutchinson* (4 Bing. N.C. 83) and *Corsar v. Reed* (17 Q. B. 540) are much more in point than the one which was cited.

In the first case the Judge insisted on nonsuiting the plaintiff, though "he did then and there insist upon the case being left to the jury, and did offer to abide their determination, and did appear on his being called, and did refuse to consent to a nonsuit;" and these matters appearing in the Bill of Exceptions, the Court gave judgment for the plaintiff.

In the second case, the only statement as to the nonsuit was, that the Judge having declared his opinion and decision in favour of the defendant, nonsuited the plaintiff, and the Court said: "We are of opinion that, if upon the trial of a cause the Judge directs a nonsuit, and the plaintiff does not appear when called, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the Judge improperly directed the nonsuit. The proper course would have been for the plaintiff, when called, to have appeared, and required the Judge to direct the jury in point of law in his favour. Upon the Judge refusing to do so or refusing to permit him to appear, he might have tendered a bill of exceptions and brought a writ of error \* \* \* But if, acquiescing in the nonsuit, he does not appear, and no direction in point of law is given to the jury, and no verdict is found, we conceive that the supposition of a bill of exceptions is an absurdity."

It is not too much to presume that the plaintiff in this last case accepted the nonsuit in deference to the opinion of the Judge; but that is obviously not the course he is required to take, and it is just as obvious, it would have found no support from the court, even if it had been stated in the bill of exceptions that he had acted and submitted to the nonsuit expressly and exclusively on that ground.

In the present case there is no reliance or insistence by the prisoner on his rights, no refusal to accept of the decision of the Judge, no protest, no objection of any kind to what had been done or was being done by the Court or by himself; but the very reverse of it all.

The prisoner not only accepted the ruling of the Judge as satisfactory, but "he did and said something" which ex-

cludes him from alleging the contrary, for the record shows that "in deference to the said judgment the said challenge is accordingly taken and treated by the said Patrick James Whelan and the said Attorney-General as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury."

I remain still of opinion the prisoner has by his conduct waived, abandoned, or passed over—whichever or whatever the proper expression may be—the erroneous disallowance of his challenge of the juror for cause,

It was argued also that the cause of error could not be passed over, surrendered or abandoned by the prisoner, and that the Court must try the question of error or no error just as if we were reviewing the judgment complained of at the very time it was pronounced, and without regard to any matter that took place afterwards upon or in respect of that judgment: that nothing whatever that subsequently was done by the prisoner can affect or remove the effect of his objection.

I endeavoured to answer this argument in the Court below. I have only now to say, that if after the ruling complained of the prisoner had withdrawn his plea of not guilty and pleaded guilty, no one, I will venture to say, could assert that that would not have avoided the objection for ever. It would "by the prisoner's solemn act on record, have become wholly immaterial"—*Wright v. the Queen* (14 Q. B. 183.) But why? Because the whole record must be looked at, and not a merely isolated part of it, for one part of it may be controlled by another, and that which may be a cause of exception in one place may be no exception when read in connection with the rest of the record.

I think the prisoner has failed to sustain the errors assigned, or any of them.

JOHN WILSON, J.—Concurring, as I do, in the judgment of the learned Chief Justice of this Court, I have but little to say.



We are all agreed that a challenge for cause may be lawfully made before a prisoner's peremptory challenges have been exhausted.

It appears to me, that when the learned Judge had ruled upon the challenge to Sparks for cause, it was open for the prisoner to have said, "I stand upon my right to have my challenge for cause tried." If this had been refused, he could have said, "I object to his being sworn upon the jury." If he had been sworn and passed upon the jury, we all agree there would have been a mistrial. If he had declared that he stood upon his right to have his cause of challenge tried, the Crown would then have had the right to say, "Let the juror stand aside," and he would not have been upon the jury. Or, it was open for the prisoner to pass it over, and peremptorily to challenge him, as he did. There is a well-known order of procedure both in civil and criminal proceedings. If a prisoner challenge the polls, he cannot recede and challenge the array; if he pleads in bar, he cannot plead in abatement. On this point I refer to the judgment of my brother Wilson. The prisoner voluntarily elected to challenge Sparks peremptorily, and on this he was not sworn. He cannot, I think, go behind this, and be permitted to say he did not peremptorily challenge him, for the purpose of having another peremptory challenge or assigning for error the refusal of it.

When Benjamin Hodgins was called, the prisoner challenged him peremptorily, alleging that he was entitled to it because he had not peremptorily challenged Sparks. The whole question seems to me to be involved in this one—whether the prisoner peremptorily challenged Sparks or not. If he did, he had had twenty peremptory challenges before Hodgins was challenged: if he did not, he had had only nineteen. Looking at the record, the question is unequivocally answered. "Thereupon the said challenge" (to Sparks) "is accordingly taken and treated by the said Patrick James Whelan, and the said Attorney General, as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon not sworn upon the said jury."

Suppose no other question in respect to the jury had arisen, and the record had closed here, could the prisoner have assigned error on this shewing? From the ruling of the Court the prisoner had sustained no injury, for Sparks had been excluded from the jury.

But Hodgins was called, and the prisoner peremptorily challenged him; on the argument it was said, for the purpose of raising error on this record in regard to Sparks. Can error in law be made error by matter of subsequent fact? On the record the prisoner here alleges that the challenge for cause against Sparks was not allowed, nor submitted to triers by the Court, but he "was required to challenge the said Jonathan Sparks peremptorily, if he desired to challenge the said Jonathan Sparks as one of the jurors of the said jury, and that the said challenge for cause should be considered as a peremptory challenge, and not as a challenge for cause, and the said challenge for cause was accordingly taken and treated as a peremptory challenge, and the said Sparks was thereupon not sworn upon the said jury." Upon this, error is assigned in refusing the peremptory challenge of Hodgins.

If what was stated on the record in regard to Sparks had been repeated here in the same words, it would have furnished a conclusive answer in regard to the prisoner's right to challenge Hodgins;—and thereupon the challenge (to Sparks) is taken and treated by the said Patrick James Whelan, and the said Attorney General, as a peremptory challenge for and on behalf of the said Patrick James Whelan, and the said Jonathan Sparks is thereupon (upon the peremptory challenge of Whelan) not sworn upon the jury.

Taking this to be the answer, can there be a doubt but that the challenge to Hodgins was properly disallowed? Including Sparks, he had had twenty challenges before Hodgins was called.

I suppose, as a rule of construction, the statement of a fact on a record at the proper time and place for its statement, is to be taken as correct, rather than a subsequent statement of the same fact varied in connection with another statement of fact.

It is said that the peremptory challenge to Sparks was made in deference to the opinion of the Court, not as the deliberate act of the prisoner, and that the challenge was forced upon him; but we find on this record, that before the prisoner had exhausted his peremptory challenges, unless Sparks be included amongst them, and before Hodgins was called, George Cavanagh was called as a juror and challenged for cause, which was allowed: that triers were duly sworn, who on their oath found him indifferent, and thereupon he was sworn on the jury.

If the ruling of the Judge at the trial was deferred to in the case of Sparks, and considered by the prisoner as compulsory and coercive on him, why did he challenge Cavanagh for cause; why was the challenge, then allowed? Is it not a matter of fair inference, that he was conscious of having exhausted his peremptory challenges; or if this was not so understood by all parties, why was his challenge of Cavanagh for cause allowed without objection; and ought he now to be heard to say, that his peremptory challenge of Sparks was not his voluntary act?

The case of Mulcahy is the only case in the English books to which we have been referred as approaching this case. It certainly did approach it, without bringing up the points submitted to us. The attention of the Court was called by Fitzgerald, J., to the effect of a peremptory challenge as an abandonment of the preceding ground of challenge, but no judgment was pronounced upon it.

I think the judgment in the Court below ought to be affirmed.

MOWAT, V. C.—On considering this case carefully, I have come to the conclusion that the judgment below should be affirmed. I have had an opportunity of reading the judgment of the learned Chief Justice of this Court, and as I entirely concur in it I have thought it unnecessary to write a separate judgment.

GWYNNE, J.—The plaintiff in error alleges that in the record and process, and also in the giving judgment thereon, there is manifest error; and he has assigned two causes of

error, which, as he contends, are, or one of them is, sufficient to entitle him to our judgment awarding him a *Venire de Novo*. He appeals not to any discretionary jurisdiction of the Court. He asks no favor; our jurisdiction extends not to granting favors. He makes his demand as one *strictissimi juris*, for the benefit of an imperative rule of law, which undoubtedly, if he be right, we have no discretion to withhold, nor have we any alternative but to grant his demand. A grave responsibility no doubt rests upon us—to take care, on the one hand, that we withhold not from him that to which he is entitled in law, and, on the other, that we yield not to him that to which he is not entitled, for by so doing we should, in the contemplation of that law which alone he has invoked, and which alone it is our duty to administer, fall into an error no less serious than that of which he now complains.

I have endeavored to the utmost of my ability to consider the matter submitted to us for adjudication with a single eye to a just and impartial administration of the law to which he has appealed, which is all that he has demanded or that we have any power to grant. I might save contented myself with a simple concurrence in the conclusions arrived at by those of the learned Judges who have preceded me with whom my convictions have led me to concur, but it is perhaps more proper, in a grave matter of this nature, upon which so few direct authorities have been found, that I should state the mode of reasoning which has led me to form the judgment which I have formed.

When the prisoner presented to the Court, at his trial, his challenge of the juror Sparks for the cause that is alleged on the record, it was competent for the Crown prosecutor *either* to demur, and thus to offer an issue in law upon the matter of the challenge, judgment upon which in favor of the demurrer would have disallowed the challenge; *or* to counterplead—that is, to set up some new matter consistent with the matter of challenge, to *vacate* and *annul* it as a *ground of challenge*; *or* to deny the truth in point



of fact of what was alleged for matter of challenge, the latter mode being the only one calling for the intervention of triers—*Rex v. Edmonds* (4 B. & Al. 474). These were the only courses known to the law open to the Crown prosecutor to adopt, in order to bring about an issue of law or of fact, which could result in the allowance or disallowance of the challenge.

He adopted neither of them, but, on the contrary, offered to the court an objection to his being called upon or compelled at that particular stage of the proceedings to adopt any of them, founded upon the contention that the time had not yet arrived for the prisoner to challenge for cause. The objection so raised constituted no pleading. It was not a demurrer, for it offered no issue upon the sufficiency of the matter of challenge; it was not a counter-plea, for it stated no new matter intended or calculated to vacate the matter of challenge as a ground of challenge; and it was not a plea, for it did not deny the truth of the matter of the challenge; and although the prisoner offered what has been called a demurrer to the objection, that demurrer presented no issue to the court which was calculated to determine, or which being decided by the court did or could determine, anything affecting the allowance or disallowance of the matter of the challenge. The court upheld the objection of the Crown prosecutor, but the challenge of the prisoner, which in law means the matter of the challenge, was not thereby adjudged to be insufficient in law or disallowed.

The decision of the court as to whether or not that was a proper time for offering a challenge for cause, gained no more force or effect from the circumstance of the objection of the Crown prosecutor having been demurred to, than if the decision of the court had been made without any such process. So far as the matter had proceeded when the judgment of the court was given, it was still only a matter of procedure as it had been before, and if the judgment of the court had been simply that the time had not yet arrived for the prisoner to insist upon the trial of the matter

of the challenge, but that the learned Chief Justice, in the exercise of his discretion, would defer that inquiry until it could have been ascertained whether a jury could not have been otherwise obtained, no complaint could have been made by the prisoner. Such a proceeding would, as it appears to me, have been a matter quite within the discretion of the learned Chief Justice as a matter of procedure, which could not have been made the foundation of an assignment of error, or *per se* proper matter to be placed upon the record.

Willes, J., in *Mansell v. The Queen* (8 E. & B. 107) says: "It is not necessary to decide the question whether these matters" (which related to the regulation of the time for stating the cause of challenges for cause) "ought to have appeared upon the record, or whether a Court of Error can enquire into them. Should it ever be material to decide that point, the counsel who have to argue the case will do well to search for precedents;" and Bramwell, B. at p. 111, says: "I think the Judge may, in his discretion, for sufficient cause, further postpone the time of assigning cause, either for the Crown or the prisoner, but not as a matter of right on a mere request without sufficient cause. I think the sufficiency of such cause a matter for his discretion; and, like every other matter which is to be decided according to discretion, it ought not to appear upon the record, and is not examinable in error." And again, "The true rule is, to postpone the time for assigning cause till all reasonable endeavors to make all answer who ought to answer have been exhausted."

But the decision of the learned Chief Justice went further, for he decided, as appears by the record, not that the time for trying the truth of the cause of challenge should be deferred, but in effect that the prisoner was not at that stage of the proceedings entitled to make a challenge for cause. This, as is now admitted, was a wrong decision, but its being so cannot alter the nature of the subject matter which was presented to him for his consideration, nor if that subject matter was not of the nature of a counter-

plea and demurrer raising an issue upon the sufficiency of the matter of challenge, can a decision so given, however wrong, make it such, or warrant its being entered on the record as such. It seems to me to be impossible to hold that this objection, this dilatory exception to being compelled at that particular time to plead or demur, can in law be regarded as a counter-plea, nor can the paper in answer thereto be regarded as a demurrer to a counterplea, nor can the judgment given thereon be treated as a judgment disallowing the challenge, so as to justify its being placed upon the record as such, and *per se* excepted to on error.

The conclusion is, that this view, which appears to me to be the proper view to take of this proceeding, disposes of the first assignment of error, which is, "that it appears by the said record that the said Patrick James Whelan challenged Jonathan Sparks, one of the jurors impannelled and returned upon the said jury, for cause of favor, as he had a legal right to do, and that the said challenge was, contrary to law, disallowed."

The record, in my judgment, does not shew what in law is regarded as a *disallowance* of a challenge. The matter upon the record shews that no pleadings offering an issue as to whether the challenge should be allowed or disallowed, as required by law, were ever presented to the learned Chief Justice for adjudication.

Whatever use then may be made of the matter which is set out upon the record in relation to what took place upon the challenge of Sparks, in connection with other matters occurring subsequently, with a view to shewing that the jury was improperly constituted, so as to cause a mistrial, it cannot be used, as was contended by the learned counsel for the prisoner, for the purpose of establishing the first assignment of error, as upon an erroneous judgment given upon a demurrer to a counter-plea, disallowing a challenge, irrespective wholly of the matters subsequently occurring.

But, independently of these considerations, I am of opinion

that the first assignment of error cannot be sustained upon the decision *per se* of the Court upon the demurrer, assuming the matter to have been the proper subject of plea and demurrer, nor without connecting that decision with some subsequent matter vitiating the construction of the jury, and thereby causing a mistrial. That decision did not *per se* constitute a mistrial. If it did, then it must equally have done so although the prisoner had refused to throw away one of his peremptory challenges to exclude Sparks, and that thereupon the Crown prosecutor, to remove all cause of complaint, had ordered him to stand by on behalf of the Crown; or, although the prisoner himself had stated to the Court that he had ascertained that he was mistaken in attributing to Sparks the expression which he had alleged as his cause for challenging him, and that therefore he would not persist in the challenge—for the contention of the learned counsel for the prisoner was, that no act of the Crown or the prisoner could after that decision divest it of its character of error, which he contends it was, or deprive the prisoner of the right to assign it as error, whatever might have been the constitution of the jury. This argument, as it appears to me, involves a confusion of what is foundation of error with error itself. In *Rex v. Edmonds* (4 B. & Al. 473) it is said, "The improper granting or the improper refusing a challenge is alike the *foundation* of error." This may readily be admitted without regarding it as error itself. It is doubtless the foundation upon which the residue of the structure which constitutes the error is built, that error being an improper formation of the jury resulting from the decision. As the privilege of challenging exists only for the purpose of securing to the prisoner a properly constituted jury, the allowance or disallowance of a challenge, except in so far as it vitiates the construction of the jury, can then have no recognized effect. I am of opinion, therefore, that neither upon principle or authority can the matters alleged on the first assignment of error be adjudged to be error *per se*.



The case then is resolved into this :—Do or do not the matters properly alleged on the record shew that the jury which tried the prisoner was improperly constituted? That question further is reduced to this :—Do those matters shew that the juror Hodgins was admitted upon the jury against the prisoner's will and demand, when he had the right, without any cause stated, in the capricious exercise of his will, to have excluded him? If the record shews that the prisoner had previously exercised his privilege of peremptory challenge to its full extent, Hodgins was properly admitted upon the jury, and there was no mistrial; but if at the time that the prisoner demanded the exclusion of Hodgins he had still one peremptory challenge left, which he was not permitted to exercise, then the admission of Hodgins upon the jury vitiated its constitution and has caused a mistrial. Whether the prisoner had or had not a peremptory challenge left when he demanded the exclusion of Hodgins, depends upon the construction to be put upon the matters set out upon the record in relation to the exclusion of Sparks from the jury. Upon this single point the whole case turns.

The contention of the learned counsel for the prisoner went so far as that, when a prisoner in consequence of a wrong decision of a judge feels himself compelled to use a peremptory challenge to exclude a juror whom he has challenged for cause, that alone constitutes error, whether in the further construction of the jury the prisoner shall or not exhaust all his peremptory challenges.

No express decision in point has been cited to us from the English Reports, but some have been found in the American. Three cases decided in the Supreme Court of Virginia, in the years 1822, 1823, and 1852 respectively, undoubtedly support this view to its fullest extent: namely, *Lithgow v. The Commonwealth* (2 Virginia Cases, 297), *Sprouce v. The Commonwealth* (Ib. 375), and *Dowdy v. The Commonwealth* (9 Grattan 737). On the other hand, four cases, two of which were decided by the Supreme Court of the State of New York: namely, *The People v. Bodine*,

(1 Denio 310), and *Freeman v. The People* (4 Denio 31); one by the Supreme Court of Tennessee, namely, *McGowan v. The State* (9 Yerger 184); and one by the Supreme Court of Arkansas, *Stewart v. The State* (8 English, 13 Arkansas, Rep. 720,) decide that where a prisoner exercises his peremptory challenges to exclude jurors whom he had challenged for cause, but his challenges had been disallowed, he cannot make the disallowance a ground of error or mistrial, if at least he had any peremptory challenges remaining when the jury was wholly made up. In *McGowan v. The State of Tennessee* the Court seem, as I understand the case, to regard the fact of the prisoner still having peremptory challenges unexhausted as conclusive evidence that he had accepted the jury as "*omni exceptione majores*."

Now it is to be observed, in relation to these cases, that those in support of the prisoner's contention decide that the fact of the prisoner having or not having exhausted his challenges makes no difference; the result is the same. That I confess seems to me to be logical, whether the decisions in those cases be right or wrong, for it appears to me to be unreasonable to hold that it should altogether rest with the prisoner whether he should or not by his own independent act constitute that to be error causing a mistrial which without such act would not be so. I confess to being unable to see the correctness of that view; and unless I shall be convinced that the error exists, and the mistrial is caused, the moment the peremptory challenge is used to exclude the juror, the challenge of whom for cause is wrongly disallowed, although the prisoner has challenges remaining when the jury is completed, I cannot think that error exists a whit more because he has no peremptory challenges remaining at the completion of the jury. I cannot adopt the reasoning that acts of the prisoner himself, designedly done for the purpose of causing a mistrial, can constitute such an error as he can complain of as a wrong done to him by the Court, or that the same consequence should be made to follow two acts diametrically opposite: namely, that the suffering Sparks to go on the jury would

have vitiated the formation of the jury, and that the keeping him off the jury by the exercise of a peremptory challenge should have the same effect.

I can follow the reasoning of O'Brien, J., in Mulcahy's case (Ir. Law Rep. 1 Q. B. 12), though I may not be able to adopt it—that the error is complete the moment the prisoner has been compelled, as it were, to throw away a peremptory challenge; in that case the error does not remain suspended, awaiting the event of the prisoner demanding, or not, the right to the exercise of a twenty-first challenge in lieu of the one thrown away.

The force of the cases in Denio's Reports is said to be weakened by the fact of their not being consistent with each other. A careful consideration of them, however, will shew that the allegation is not well founded. In *Freeman v. The People*, (4 Denio 31), the prisoner had made several challenges for cause, and triers had been duly appointed. The Court in giving judgment said: "Various exceptions were taken by the prisoner's counsel to points made and decided in disposing of those challenges, and although the several jurors thus challenged were ultimately excluded by the peremptory challenges of the prisoner, it is now urged that these exceptions are still open to examination and review in this Court. I think otherwise. The prisoner had the power and the right to use his peremptory challenges as he pleased, and the Court cannot judicially know for what cause or with what design he resorted to them. \* \* \* Having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision."

Now this latter case here suggested was the very case of *The People v. Bodine* (1 Denio 311), which was probably present to the mind of the Judge who delivered judgment in *Freeman v. The People*, and who was the same Judge in both cases.

In *The People v. Bodine*, it was contended that the

prisoner, having peremptory challenges at his command, and not having used them to exclude a person whom he had failed to exclude from the jury on a challenge for cause, was not precluded from assigning errors (or filing exceptions rather, which by Statute appears to be the practice in the States), in respect of matter which was contended to have been erroneous in the course of the trial of the challenge for cause.

That case was as if the Crown should have contended, in case Sparks had been sworn on the jury after the decision of the learned Chief Justice, that the prisoner should be concluded from assigning error because, having had peremptory challenges at his command, he had not used one to exclude him. So that *The People v. Bodine* is in perfect accord with *Freeman v. The People*, and with our law *in consimili casu*.

Viewing the question here as one of mistrial or no mistrial, there is a case, namely, *The Queen v. Mellor* (1 Dears. & Bell 468, 4 Jur. N. S. 214), decided in 1858, which appears to have some bearing upon the case.

The point came up on a case reserved for the consideration of the Court of Criminal Appeal. The prisoner was convicted of murder and sentenced to death. The panel of petit jurors contained the names of two persons—Joseph Henry Thorne and William Thorniley. The name of Joseph Henry Thorne was called from the panel as one of the Jury to try Mellor, and Joseph Henry Thorne, as was supposed, went into the box, and was duly sworn as Joseph Henry Thorne, without challenge or objection. It was, however, discovered the next day, and after the prisoner had been convicted, that William Thorniley had by mistake answered to the name of Joseph Henry Thorne when called, and had gone into the box and been sworn as Joseph Henry Thorne, the prisoner having been offered his challenge when the person called Joseph Henry Thorne, but who was really William Thorniley, came to the book to be sworn. The mistake having been communicated to Wightman, J., who tried the prisoner, and it seeming to him that



the mistake had caused a mistrial, for that in effect the prisoner was deprived of his right of challenging William Thorniley, against whom he might have had substantial ground of challenge, he reserved the point for the consideration of the Court of Criminal Appeal. Seven Judges held that the Court had no jurisdiction, and that the matter, if objectionable, could only be raised upon a writ of error, and as error in fact. Five held that the Court had jurisdiction, and that the mistake had caused a mistrial; but six held that there was no mistrial; and the conviction was affirmed. Now by that case it is established:

1st. That a mistrial vitiates and annuls the verdict *in toto*, and the only judgment is a *Venire de Novo*, because the prisoner never was in contemplation of law in any jeopardy upon his first trial.

2nd. That matter which would vitiate a verdict against the prisoner equally vitiates it if he be acquitted, and consequently that, notwithstanding the acquittal, the Crown might at any distance of time, in this case now before us, bring error; and

3rd. That the conduct and acts of the prisoner, in relation to procedure at his trial, may create a compact between the Crown and the prisoner, that no objection shall be made in respect of such procedure.

If this principle thirdly enunciated is not to be qualified so as to apply to cases of mistake, such as the mistake in that case was, not arising from the default or acts of the Court or its officers, and if the present case can be brought within that principle, then *The Queen v. Mellor* has an important bearing upon the present.

The principle is thus enunciated by Byles, J., (1 Dears. & Bell, p. 522): "In this case, as soon as the prisoner omitted the challenge, and thereby in effect said, 'I do not object to the juryman there standing,' there arose a compact between the Crown and the prisoner that the individual juryman there standing corporeally present should try the case."

Now, it certainly does appear to be a startling proposition,

and yet I apprehend that upon principle and authority there is no doubt as to its correctness, that if the matter complained of here has caused a mistrial, the prisoner has never been in contemplation of law in charge of a jury; and he would have been at any distance of time, although acquitted, subject to a second trial upon application of the Crown, upon the same grounds as now urged by him. Such a consequence, in mercy to all prisoners who may in time to come be so situated, only imposes upon us the greater necessity for the greatest deliberation, and for a conviction in our minds amounting to absolute certainty, as far as human judgment can attain that end, before we yield to the contention of the prisoner.

In *Mellor's* case the same identical arguments as have been urged here, were urged by the prisoner's counsel, and by those of the learned Judges who acceded to his contention, but they were not permitted to prevail, and that case must now be adhered to as establishing a rule to govern all cases coming within its principle.

Now I must confess it does appear to me, that a prisoner has more just reason to complain that he has been wrongfully prejudiced by being misled into suffering ignorantly a person against whom he may have had the most undoubted grounds of exception to enter the jury box, and to be sworn under a false name, and as representing a person against whom he had no objection, than the prisoner here has to complain at being placed in the position of being compelled to select whether or not he should suffer Sparks to have gone upon the jury as the consequence of the decision of which he complains, or should interpose to prevent that consequence by the exercise of a peremptory challenge; and it further appears to me, that what occurred in this case can with more reason be said to amount to a compact between the Crown and the prisoner than what occurred in *Mellor's* case. How can the prisoner under such circumstances be now heard to say, that his own act of interposition, to prevent the consequence of the decision, is itself a consequence of the decision? It appears to be

altogether unreasonable to hold, as I think we must if the prisoner's contention prevails, that the subsequent proceedings were real only on one side, illusory on the other; and that it is one of the privileges of a prisoner, while openly declaring that he is exercising his right of peremptory challenge, to reserve to himself the secret intent of afterwards asserting that he did so for the purpose of deceiving, and of securing to himself a refuge in error in the event of the verdict being unfavorable to him. If such a use of a peremptory challenge can vitiate the construction of a jury, it may, I think, with more truth be said that the vitiation is the consequence of the act and design of the prisoner, than of the decision of which he complains.

In *Mulcahy's* case, already referred to, as in the American cases, the prisoner's challenges were not exhausted, and although the point of the disallowance of the challenges for cause being cured by the exercise of peremptory challenges might have been made, it was not made, and was not decided, for the reason, as appears to me, that the Crown had very plain reasons for waiving that point, and for wishing to obtain the judgment of the Court upon the *matter* of the challenges and their sufficiency. That the Court did not consider that by giving judgment upon the insufficiency of the causes of challenge, which would have been unnecessary if the use of the peremptory challenges cured any error, they were directly or indirectly deciding that the use of the peremptory challenge did not cure any defect, I think appears from the fact that only two of the Judges refer to the point, and they in language which clearly shews that they were expressing impressions and not *adjudicating*, the Crown having expressly asked, and having imperative reasons for desiring, to have the judgment of the Court upon the sufficiency or insufficiency of the causes of challenge, which, as it appears to me, it was competent for the Crown to do, and reasonable in the Court to accede to. At the close of his judgment, Fitzgerald, J., says: "There is a matter to which I wish to call attention again, *although pronouncing no judgment*. In the course of the argument

a difficulty pressed me in reference to the two challenges, which I stated to counsel. The illegal disallowance of a challenge is a ground of error, to be remedied by a *Venire de Novo*. But why? Because there has been a mistrial,—because an unqualified or incapacitated person was sworn on the jury. In the particular case before us, immediately after judgment was given on the challenges, the prisoner challenged the jurors peremptorily, and they were set aside; so that it happens that no improper person was put on the jury; and, as the prisoner's peremptory challenges were not exhausted, we must assume that the jury consisted of twelve able men, properly qualified. I suggested whether by this course there had not been an abandonment of the preceding challenges, or, at least, whether a course had not been taken which prevented the prisoner from relying on the disallowance of the challenges as a ground of error. The answer given" (plainly by the prisoner's counsel) "to the suggestion was, that our judgment must be given now as it ought have been given at the time of the challenges below. If so, what would be the result? That Henry Fry and James Booth ought to have been excluded. Well, they have been excluded. Where now is the error on the record, or where the ground for a *Venire de Novo*? I cannot see it at this moment. I merely now wish to say that my mind is not satisfied on the point. *If the prisoner intended to rely on the challenges he should have allowed the jurors to have been sworn, and then if he was right in the law on the challenges, he would have had a Venire de Novo.*" In view of this language of a Judge in the presence of the Court giving judgment on the other points, I cannot see how we can regard the case as involving a decision direct or indirect upon a point so referred to. It shews merely, as it appears to me, the opinion of two of the Judges of the Court upon the point.

The learned Judge no doubt alludes to the fact that the prisoner's challenges were not exhausted, but when he points out the proper course to be pursued, in his opinion, to complete the ground of error, he designates a course



equally applicable whether the challenges should become exhausted or not in the formation of the jury; and which course would of necessity have to be pursued immediately upon the challenge for cause being disallowed, namely, "he should allow the juror to be sworn, and then, if right in law, he would have his *Venire de Novo*."

In the absence of any express decision in our own Courts, I concur in the opinion of Judge Fitzgerald above expressed, and in the decisions of the American Courts which, (where the peremptory challenges are not eventually exhausted in the formation of the jury), have held that the exercise of a peremptory challenge by a prisoner, for the purpose of excluding a juror in respect of whom a challenge for cause had been disallowed, operates as an abandonment of the ground of error, if any there be, in the disallowance of the challenge for cause. And, in the absence of all authority upon the further point, I conceive it to be more logical, and in accordance with principle, to hold that the fact of his peremptory challenges being subsequently exhausted by the prisoner in the formation of the jury makes no difference. I cannot reconcile it with any principle that the question of abandonment or non-abandonment should be held in suspense in the hands of the prisoner, to be determined only by the event of his using or not using his last challenge. Consistency, as it appears to me, demands that we should hold that the use of the peremptory challenge operates as an abandonment in *both* cases or in *neither*. I can see no rational distinction between the two cases, and that it does so operate in both seems to me to be the most sound view. It is but reasonable, I think, that a prisoner should, immediately upon the disallowance of a challenge for cause, (if he complains of it as wrong, and desires to make it the foundation of error), be called upon unequivocally and unreservedly to elect whether the superstructure shall then be completed irrevocably or not, irrespective of any contingency over which the prisoner alone can have control. This can readily be done by letting the juror be sworn. I can see no hardship

which such a course would inflict upon a prisoner ; nor, when he has elected which of two courses open to him he shall adopt, can I see how he can be heard to say that the choice was not his own act, and subject to all the consequences incident upon an act of his own.

There remains, however, to be considered the question upon which, as I have said in my judgment, this case must turn. Does the record shew that when the prisoner demanded the exclusion of Hodgins he had still a peremptory challenge left, which he was not permitted to exercise, and do the matters on the record conclude the prisoner from contending that he had ?

Although the matter which was under the consideration of the Chief Justice and decided by him, with reference to the proper time for exercising the privilege of challenge for cause, was not, in my opinion, the subject matter of counterplea and demurrer, and has no right to a place on this record as such, still I am clearly of opinion that the prisoner had a right, with the view of establishing if he can a mistrial, to have what did take place relative to that matter placed upon the record, and being placed there it is properly there. As soon as the prisoner made his challenge for cause he had, I apprehend, a right to have that recorded by the clerk ; he had in like manner a right to have whatever took place in respect of his challenge recorded ; for until disposed of in some manner the swearing of the jury must be suspended, and the entries kept by the clerk would be imperfect unless they should shew how the swearing of the jury came to be proceeded with, and the jury to be formed after the challenge for cause was made. It is from these entries, so made by the clerk, that the record must be made up for the assignment of errors.

The cases in 2 *Hale*, P. C. 296, 307, 308; 2 *Rolle's Rep.* 261, and 4 *Burr.* 2287, are clear authority, if authority be necessary, that all matter presented for adjudication, and the adjudication itself on that matter presented, are proper to be placed upon the record, although it may not be capable of being placed there in the shape of plea and demurrer.

Now what is properly shewn upon the record must be taken to be undoubted verity ; it cannot be contradicted either by or against the prisoner. If it therefore shews that the prisoner did exclude Sparks from the jury by the exercise of his privilege of peremptory challenge, then my judgment must be in favor of affirming this conviction. I confess that my mind has been long and much embarrassed upon this point, in consequence of matters being, as it appeared to me, introduced upon the record casting a shade of ambiguity upon what did occur at the trial, and which should not I think have formed, if they did form, part of the entries made by the Clerk of the Court at the trial, and which should alone form the basis upon which the record brought up to the Court above should be prepared.

It is difficult to understand how the Court could by its own act apply one of the prisoner's challenges against his will. My doubts as to the proper construction to be put upon the record upon this point have, however, been removed by the judgment of the learned Chief Justice of this Court; and I am now satisfied that in substance what the record must be taken to shew is, that the prisoner, after the decision of the Court upon the challenge of Sparks for cause, in order to prevent his being sworn upon the jury, excluded him by the exercise of a peremptory challenge ; and that it was so treated by the Crown and the prisoner throughout the course of the proceedings for the formation of the jury ; and that, upon the faith of that being so, the challenge of Cavanagh for cause was tried, and the peremptory challenge of Hodgins was disallowed.

If then the record does sufficiently shew that in fact the prisoner had exhausted all his peremptory challenges when Hodgins was called, he is precluded now from asserting that he had not ; that would be the assignment of an error in fact in contradiction to the record. In that case Hodgins was properly sworn and admitted on the jury, and his admission there cannot vitiate the trial ; so that the question of error must revert to this—was there error complete when the prisoner used, or as he now contends threw away, a per-

emptory challenge for the purpose of excluding Sparks? Unless that act involved in law a malformation of the jury which was eventually completed, there is not, nor in my judgment can there upon any rational principle be contended to be, any error, or, in other words, any mistrial, established. Upon this point I have already expressed my opinion, and that, to have completed the error, of which the decision of the Chief Justice may have laid the foundation, Sparks should have been sworn upon the jury.

That mode of procedure would enable the Court with certainty and precision, which the allegation that there is manifest error seems to require, to say it is apparent that the jury has been erroneously constituted, instead of inferring that it must have been upon the suggestion that there is no mode of determining how far the decision of the Judge may or may not have affected the prisoner in the then future constitution of the jury. With the greatest deference, which I truly entertain, for the judgments of those with whom in this Court or elsewhere I feel myself conscientiously compelled to differ upon this point, this very suggestion of doubt, coupled with the kindred doubt whether a prisoner may not designedly exercise his privilege of peremptory challenge for the express purpose of vitiating the construction of a jury for the due construction of which the privilege is given to him, divests the argument of all logical weight, and only to my mind affords stronger reason for holding that the true principle, to enable the Court to say that error is apparent upon the record, is to let the juror in respect of whom a challenge has wrongly been disallowed be sworn upon the jury. Then, and then only, as it appears to me, where the question is mistrial or no mistrial, can the Court with propriety be called upon to pronounce the judgment, in the language of the assignment, that there is manifest error apparent on the record.

Whether this judgment upon a point of novelty in our Courts, and involving the doubt which the difference of opinion among the members of this Court shews, be sound or not, it is a matter of great satisfaction to me that the em-



barrassment in which I for some time felt myself involved, from what appeared to me to be the ambiguous frame of the record, has been removed. It is also matter of satisfaction to me to feel (although the feeling could not be permitted to affect me, and has not affected me, in forming my judgment upon the points of error raised) that the prisoner had really no objection to the juror Hodgins more than to any other man, but that, as was stated in argument, he was challenged, as I presume any other juror would have been, with the view of supplying material, if it should be necessary, for the purpose of raising the abstract question of law involved in the circumstances attending the exclusion of Sparks from the jury.

DRAPER, C. J. OF APPEAL.—Our judgment is that the judgment of the Court below be affirmed. The award of execution remains on the record, and unless there be a further respite the law will take its course.

*Judgment affirmed.*

J. H. Cameron, Q. C., for the prisoner, applied for leave to appeal to the Judicial Committee of the Privy Council, citing *Macpherson's Practice of the Judicial Committee*, pp. 3, 4, 5, and the cases there referred to.

The Court retired to consider this application, and on their return :

DRAPER, C. J. OF APPEAL, said,—We find nothing among the rules given in the appendix to the work cited, by which it is declared that the leave now asked for must be obtained. In the cases from India referred to, which we have examined, a clause in the charter of the Court appealed from rendered it necessary; but there are exceptional cases where an appeal has been entertained, though by the charter leave could not be granted (*a*). There is nothing to shew that such leave is necessary here, and therefore,

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(a) See *Macpherson's Practice*, p. 21.

assuming that the Privy Council have jurisdiction and would entertain an appeal in this case, a question which we do not enter into, we think they will do so without express leave to appeal being given by this Court (a). We therefore make no order granting it (b).

An order was then made, that the Sheriff "do re-deliver the said Patrick James Whelan, the plaintiff in error, into the custody of the Sheriff of the County of Carleton, and keeper of Her Majesty's gaol for the said County."

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(a) See, in addition to the cases cited by Mr. Macpherson, *Mutusawmy Jagavera Yettapa Naiker v. Vencataswara Yettia*, L. R. 1 P. C. 1; *Ko Khine v. Snadden*, L. R. 2 P. C. 50; *Regina v. Murphy*, L. R. 2 P. C. 35.

(b) The prisoner applied for a further respite, to enable him to appeal to the Judicial Committee of the Privy Council, but this was not granted, and he was executed on the 11th February. He had been respited from the 10th to the 29th December, and from that day until the 11th February. No formal record of the proceedings in the Court of Error and Appeal was drawn up.

As to the right of appeal and the jurisdiction of the Privy Council: No appeal to England is expressly given by our statutes in criminal cases, and there has been no instance of such an appeal from this country. It would seem that the Queen in Council has an inherent prerogative right to exercise an appellate jurisdiction in all cases, criminal as well as civil, arising in the Colonies, where by statute or otherwise the power of the Crown has not been parted with. Had this been an application for new trial, under *Consol. Stat. U. C. ch. 113*, no appeal apparently could have been entertained, for that statute declares that any order of our Court of Error and Appeal shall be final. Where the power exists, however, the circumstances under which an appeal will be entertained in a criminal case must be very special, and the instances are very rare. See *Regina v. Bertrand*, L. R. 1 P. C. 530; *Regina v. Murphy*, L. R. 2 P. C. 35; *The Queen v. Eduljee Byramjee*, 5 Moo. P. C. 276; *In re Ames*, 3 Moo. P. C. 409; *Macpherson's Practice*, chapters 1 and 2. As to appealing from a decision in error, see *Tronson v. Dent*, 8 Moo. P. C. 419.

## PICKERING v. ELLIS.

*Agreement to hire—Evidence of.*

In an action for wages of the plaintiff's son as defendant's servant, it was proved that defendant had said he would give the son what was going ; that the son went to him at twelve years of age, and worked for him four years, and that, on his leaving, defendant told him to send his father and he would settle with him.

*Held*, affirming the judgment of the County Court, that this was clearly evidence to go to the jury of an agreement between plaintiff and defendant.

APPEAL from the County Court of Halton.

Action on the common counts, for work done and services rendered by the son of the plaintiff as hired servant of the defendant, &c.

Pleas.—Never indebted, payment, set-off, and statute of limitations.

At the trial the plaintiff's son was called, and he stated that he became servant of the defendant on the 25th October, 1859, being then twelve years old : that he was present when there was an agreement made between plaintiff (his father) and the defendant, and that the defendant "said he would give me what was going ;" that he worked for the defendant four years, when defendant told him to go home and tell his father to come down and he would settle with him. This was said when he left defendant's service. In his cross-examination he said the defendant said nothing to him about wages, nor he to defendant.

Other testimony was called to prove the value of the labor of the son, &c.

On this evidence the defendant's counsel moved for a non-suit, which was refused. The defendant called witnesses, and the jury found \$81 for the plaintiff.

In the following term the defendant obtained a rule *nisi* to enter a verdict for defendant or a non-suit, or for a new trial, which rule was discharged with costs ; and against such decision this appeal was brought.

*Moss*, for the appellant, cited *Ex parte Macklin*, 2 Ves. 675; *Rex v. The Inhabitants of Chillesford*, 4 B. & C. 94; *Perlet v. Perlet*, 15 U. C. R. 165.

*C. S. Patterson*, contra, cited *Rex v. Inhabitants of Sow*, 1 B. & Al. 178; *Davies v. Davies*, 9 C. & P. 87.

MORRISON, J., delivered the judgment of the court.

We are of opinion that the appeal should be dismissed. We cannot see how the learned Judge could have withdrawn the case from the jury, as there was evidence of an agreement between the plaintiff and the defendant respecting the hiring of the plaintiff's son.

On the argument it was pressed by Mr. Moss, for the defendant, that the expression used by the witness "defendant said he would give me what was going," negatived any contract with the plaintiff, his father. What the witness meant when he used these words in the witness box would depend altogether on the way in which the testimony was elicited at the trial. On his cross-examination it does not appear that the attention of the witness was called to the terms used by him by either party. One fact is clear: the son was in the defendant's service for four years; and it was for the jury to say whether there was a contract made with the plaintiff at the time spoken of by the son. If they were satisfied of that fact it may be fairly presumed, from the continuance in the service of the defendant, that it was on the original terms, and when we consider the age of the son at the time, it is only reasonable from the testimony to infer that the contract was with the father. The Judge in the court below was perfectly satisfied with the verdict, and we think that the jury were justified in finding as they did.

On the argument it was suggested by defendant's counsel that the son might still bring an action against the defendant for his wages, when the court intimated that it would be satisfactory if the plaintiff would obtain a release from his son to the defendant. Since then the release has been filed with the clerk, and all apprehension of any further demand is at an end.

*Appeal dismissed, with costs.*



## PENLINGTON V. BROWNLEE.

*Proof of title—Offers to purchase—Estoppel.*

A plaintiff in ejectment proved that he had leased the land to one B., and that after he had left possession defendant went in ; that defendant offered to purchase at the valuation of a person named, and after the commencement of this action offered \$800 for the place.

*Held*, sufficient evidence to go the jury, without further proof of plaintiff's title.

An objection that the title relied on is not the same as that mentioned in the notice cannot be taken advantage of after the trial.

EJECTMENT to recover the east half of lot 20, in the 5th concession of the township of Garafraxa.

Defendant appeared and defended for the whole of the lot, on the 30th January, 1868.

The plaintiff in his notice of title claimed as heir-at-law of the late Samuel Penlington, the last surviving trustee under the will of the late James Drabble, deceased.

The cause was tried at the last fall Assizes at Guelph, before Morrison, J.

The plaintiff called a witness, who proved that he had been agent of the lot for thirty years : that he was plaintiff's agent : and as agent of the plaintiff gave a lease of the land to one Robert Brownlee, who went into possession under it ; he was in possession for some time but paid no rent, and he left the possession, and the lease expired some years ago ; this occurred probably before defendant went into possession ; he found defendant in possession ; he was aware some time ago that defendant was in possession, and had offers on behalf of defendant to purchase the lot, but the price was not sufficient ; defendant was not authorized to remain in possession ; defendant called on plaintiff's agent about the property within a month, and was referred to the plaintiff's solicitor.

Another witness proved that defendant was in possession of the land in 1867 ; he requested the witness to write to the plaintiff's agent to purchase the place, at the valuation of a person named, who was employed by the plaintiff's agent to value the property and to give him the refusal of

the lot ; defendant declined to purchase at the price fixed ; defendant mentioned he had heard some dispute about the title. The witness said he had written to Mr. Ridout, plaintiff's agent, as defendant requested him. It was admitted that defendant had called at the office of the plaintiff's solicitor in pursuance of Mr. Ridout's request, and had offered to purchase the lot from the plaintiff for \$800, which the solicitor declined.

On this there was a verdict for the plaintiff, with leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the plaintiff ought not to recover on the evidence.

*Harrison, Q. C.*, obtained a rule to set aside the verdict and enter a non-suit or a verdict for the defendant, pursuant to leave reserved, on the ground that the plaintiff failed to prove the title set out in his notice, or that defendant at the time the writ was issued was not estopped by reason of anything that was shewn at the trial from denying the title of the plaintiff as he had done by his appearance to the writ, and that the offer to purchase proved at the trial, made to the plaintiff's attorney long after the issue of the writ, in no way entitled the plaintiff to a verdict, without some evidence of the title alleged in his notice.

*G. D'Arcy Boulton*, shewed cause. No objection was taken at the trial that the plaintiff's title proved was different from that set up in his notice. *Kennedy v. Freeth*, 23 U. C. R. 92, is authority to shew that the objection cannot now be taken. The plaintiff shewed that Robert Brownlee was in possession under a lease from him, and continued in possession some time before the plaintiff took possession, and the defendant's offer to purchase before action brought was quite sufficient, in the absence of any right shewn on behalf of defendant, to warrant a verdict. *Drake v. North*, 14 U. C. R. 476, is quite in point, and fully sustains the plaintiff's case. The offer to purchase after action was evidence to go to the jury

from which they might well infer that the plaintiff was the owner. *Fisher v. Johnson*, 25 U. C. R. 616, shews that what occurred after action brought may, when given in evidence, reflect back on the state of things existing at the time the action was brought: *Cole* on Ejectment, 211, 213.

*Harrison*, Q. C., in support of the rule. The judgment in 14 U. C. R. 476, is based upon *Doe Bord v. Burton*, 16 U. C. R. 808. But in the latter case there was a written agreement between the parties, under which the defendant was allowed to retain possession to a certain time, and in that way defendant might be considered as holding possession under the plaintiff; but here there was not such a state of facts; and the defendant in that case also told the person from whom the plaintiff purchased the land he might sell it to whom he pleased, and also brought a man with him whom he wished to become the purchaser.

RICHARDS, C. J., delivered the judgment of the court.

The point that the plaintiff's case made out at the trial was not the same as that contained in the notice of claim, does not seem to have been raised at *nisi prius*, and cannot now be taken advantage of.

On this record we apprehend that all that is necessary to be established is that there was evidence to go to the jury on which they might find a verdict for the plaintiff. We think there was sufficient evidence to go to them, and that the learned Judge could not properly have directed a nonsuit.

The facts clearly shewn are, as we understand, that a person named Brownlee went into possession of the land under a lease from the plaintiff for a term of years, which lease was given through the plaintiff's agent, who had been looking after the lot for thirty years: that sometime after this Brownlee left the premises, and this defendant, another Brownlee, went into possession, and requested a witness (who was called) to write to the plaintiff's agent to purchase the land at the valuation of a person whom the agent had employed to value it. This offer to purchase

fell through, and after this action was commenced defendant offered to give \$800 for the place. These offers, before and after the commencement of the action, do not appear to have been accompanied by any denial of ownership on the part of the plaintiff, or any assertion of right or title in himself. The witness said that the defendant at one time said he had heard there was some dispute about the title.

Wet hink, these facts being undisputed, and the defendant not in any way shewing title or claim to the property, the jury were well warranted in finding for the plaintiff.

*Rule discharged.*

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### DOUPE V. STEWART.

*Partners—Lien—Award—Bill in Chancery.*

The plaintiff having compiled a book, caused it to be printed by a firm consisting of himself and defendant, on paper furnished by them; and defendant having refused to give up to him the copies thus printed, he brought trover. *Semble*, that he could not recover, for the property belonged to the firm, and defendant had as much right to retain as the plaintiff to take it.

There was evidence, however, of an agreement between them by which the copies had become the plaintiff's property; and as this view had not been fully submitted to the jury, and the damages given for the plaintiff were excessive, a new trial was granted.

An award having been made between the parties, the plaintiff afterwards filed a bill to dissolve and wind up the partnership as if no such award had been made, and swore that he was advised and believed the award was invalid.

*Held*, that this bill was not evidence against him to shew that he had so treated the award; but that he should not have used the award to support his case, and on this ground the new trial was granted without costs.

TROVER for conversion of a number of copies of a book called "The Orange Directory of Western Canada."

Pleas—Not guilty, and not possessed.

The cause was tried at the city of Toronto Assizes, last spring, before Gwynne, Q. C., when a verdict was rendered for the plaintiff, and damages were assessed at \$450.



The evidence, so far as was material, was as follows :

*Andrew Fleming* said : The plaintiff was a long time compiling the work. Both plaintiff and defendant informed witness they were in partnership as printers and publishers of the newspaper *British Constitution* ; the book was printed at that establishment ; plaintiff was engaged in the preparation of this book before he was in partnership with defendant in the newspaper ; I never understood there was any other partnership between them than with respect to the paper ; defendant had a printing business before he went into partnership with plaintiff ; plaintiff paid, as witness understood, a bonus to defendant for taking him into partnership.

*Joshua E. Woodland* said, the manuscript he believed belonged to plaintiff ; the covers were worked off in the office of the *British Constitution* ; the book was also set up there ; defendant had no interest more than to get it out and get his money for it ; it was completed ; can't say why it was not issued ; the newspaper, the book and job work, were done at the printing establishment of plaintiff and defendant ; the material belonged to the firm ; can't speak as to the paper ; the paper was delivered at the office ; the type was set up by workmen in the employ of the firm ; the printing of the book was completed.

*Francis Crooks* said : He was with the plaintiff when he demanded the Orange Directory from defendant ; defendant said when plaintiff had paid for it he would get it ; plaintiff said he did not owe defendant anything ; plaintiff again asked for the book and defendant again refused, saying when the plaintiff paid for it he would get it.

*Thomas M. Daly* said : There was an arbitration between plaintiff and defendant ; witness was appointed an arbitrator named by plaintiff ; defendant at the arbitration claimed only for the printing and publishing of the Directory ; he made no claim to the work itself ; he claimed upon it \$191 ; the plaintiff complained at one time of defendant's delay in getting the work out ; defendant said he would get it out in a few days ; witness asked defendant

after to give up the work; he said he would not till it was paid for or their differences settled.

*W. T. Mason* said, he was umpire; he found defendant indebted to plaintiff to the extent of \$476, less \$191 for printing the directory; the directory was represented as having been printed by the firm; the printing was an asset of the firm.

*John Edwards* said, he stitched the directory; over 1,800 copies; received them from Stewart & Doupe; plaintiff told the witness not to deliver them to any one but himself: he thought it unsafe, so sent them back to the office from which they came; defendant paid for stitching on delivery; the charge was four dollars a hundred.

At the close of the plaintiff's case defendant's counsel moved for a nonsuit on various grounds.

For the defence *Robert Lovell* said, striking off about 800 copies of the work, after the type was set up, was done by Lovell & Gibson; it is not paid for yet; the charge is about \$12.

There was a verdict for the plaintiff, as before stated.

In Easter Term last *A. G. McLean* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial granted, for misdirection, for that the jury should have been told that no possession of the goods had ever been in the plaintiff, and no property ever passed to him, and that his remedy, if any, was by action on the contract to print: that the jury should have been told the possession of the goods was in the plaintiff and defendant as partners, and the plaintiff could not therefore recover; for the rejection of evidence, by refusing to submit to the jury the office copy of the bill in Chancery, tendered by the defendant as evidence that the plaintiff had abandoned the award as bad, and it was therefore no evidence of a settlement of accounts. Also, because the verdict was contrary to law and evidence; and on the ground that the award had been waived by both parties; and on grounds disclosed in affidavits filed.

In this Term *Harrison*, Q. C., shewed cause. The defendant had no lien on the directory for the printing and publishing, because the plaintiff was a partner with the defendant in the work so done and the materials found for it: *Stephens v. Heathcote*, 2 L. T. Rep. N. S. 112; *Holderness v. Rankin*, 3 L. T. Rep. N. S. 203, 28 Beav. 180; *Curtis on Copyright*, 83; *Graves v. Sawcer*, *Sir Thos. Raym.* 15; *Wickham v. Wickham*, 2 K. & Johns. 494; *Lindley on Partnership*, 573. Defendant has been paid for all this work, for his account has been overdrawn, and the charge for printing, &c., amounting to \$191, has been charged to the plaintiff. The certified copy of the bill in Chancery, filed by the plaintiff, was not evidence against the defendant of the facts contained in it: *Boileau v. Rutlin*, 2 Ex. 665. The award between the parties has not been set aside, but a decree has been made for taking the partnership accounts between the parties.

*McLean* supported the rule. At the trial the plaintiff contended there was no lien only because there had been an award made between the parties: *Clay v. Yates*, 1 H. & N. 73. The plaintiff used the award improperly, and to the surprise of the defendant; for after filing a bill in Chancery to vacate the award, and to have an account taken irrespective of it, it was improper of him to make use of it at the trial as a valid and binding award to support his claim. The plaintiff should now be compelled to pay the costs of granting a new trial, or the defendant should be granted a new trial without costs: *Anderson v. George*, 1 Burr. 353; *Trubody v. Brain*, 9 Price 76. The copy of the bill in Chancery was admissible as evidence: *Brickell v. Hulse*, 7 A. & E. 454; *Bates v. Townley*, 2 Ex. 152.

ADAM WILSON, J., delivered the judgment of the court.

The plaintiff was the author of the book in question, called *The Orange Directory*. The paper on which it was printed was furnished and the printing was done by the partnership of Stewart and Doupe, consisting of the plaintiff and defendant.

If the defendant in respect of the partnership had a lien on the book when printed, for the expense of printing and publishing it, as against his co-partner, then the other questions will arise, as to whether the partnership was paid the amount of the claim, and if not paid, whether the award which was made between the parties entitled the plaintiff to maintain this action, and whether he could make use of the award as a valid award after having taken proceedings in Chancery to vacate it, and after having got a decree which in effect it is said avoids the award.

If the defendant as a co-partner had no lien, or if he had no right as such co-partner to retain the book, then the plaintiff must be entitled to recover against the defendant for some amount of damage for the conversion complained of.

If the book had been printed and the paper found for it by the plaintiff and defendant as co-partners for a third person, they would have had a lien upon it for their work and materials against him.

I do not see why the one partner may not have a claim in respect of this publication as partnership property against the other, if not for the work done on it, at any rate for the materials.

If two merchants carry on business, and one of them appropriates or proposes to appropriate to himself a portion of the common stock, and to charge himself in account with the price, the other would have the legal right to prevent the goods being so appropriated, either absolutely or unless the money was paid for them, because the goods are as much his to retain as they are the goods of the other to take.

In many cases this restraint must be quite necessary and may very properly be exercised, otherwise one partner would have it in his power to overdraw his account to the ruin of the partnership.

This must be the rule with respect to goods which belonged to the partnership. Whether the right of retention or lien, or whatever it may be called, can be applied in



respect of work done on goods the property of the individual partner, may not be so obvious.

Co-owners of a ship have no lien on the shares of each other in the ship, for they are tenants in common and not joint tenants, and it is only when the property is joint—that is, when there is a partnership—that there is the lien, claim, or right of one partner to have the share of another partner applied in payment of the partnership debt, and then in payment of the partner's debt to his co-partners: *Ex parte Young* (2 V. & B. 242). Even for repairs done on the ship there is no such claim or lien on the share in or proceeds of the ship: *Green v. Briggs*, (6 Hare 395); *French v. Styrling*, (2 C. B. N. S. 357).

It would seem then to follow, that if work be done upon property of the partner, or materials be supplied for the work on that property, by the partnership, there can be no lien or claim by the other members of the partnership upon that property, nor would they have a claim upon such partner's stock or interest in the partnership, for when a firm deals with a partner as a stranger there is no lien: *Pinkett v. Wright*, 2 Hare 120, affirmed 12 Cl. & Fin. 764.

In this case there was no work done on property which belonged solely to the plaintiff. The manuscript from which the directory was printed was his, but there was no work done upon it; the work that was done was in printing copies from the manuscript upon paper belonging to the two partners. The whole book, printing, paper and stitching, was made from materials which were the property of the firm, and therefore belonged to the firm. This has nothing to do with the manuscript, copyright, or profit to be made on a sale of the work, which belonged exclusively to the author or owner of the directory.

We do not see any difference between this directory when printed, and ordinary property of the partnership, which one partner has rightfully or wrongfully as much right at law to retain as the other has to take it.

If, however, it was quite agreed between the plaintiff and defendant that the printed book should be the exclusive

property of the plaintiff, and it thereupon became his sole property with the defendant's assent, upon the plaintiff being charged in account with the price of it, \$191, then it may be the plaintiff may be entitled to recover it by action, or its value for the detention or conversion.

This view of the case was not fully submitted to the jury, and as the learned Judge has reported that in his opinion the damages assessed were very excessive, we think there must be a new trial.

The rule cannot be granted on payment of costs to the defendant, because the defendant's counsel was not taken by surprise by the production of the award, inasmuch as he was prepared with a certified copy of the bill in Chancery to avoid its effect; but that evidence was not admissible for the purpose for which it was attempted to be used, namely, the truth of the fact that the plaintiff alleged or treated the award as invalid: *Boileau v. Rutlin* (2 Ex. 665.)

But it should be without costs, for the plaintiff should not have used the award to support his case, when he had filed a bill to dissolve and wind up the partnership as if no such award had ever been made, and after he had sworn in that suit that he was "advised and believed the award is not legally binding on either of us."

Perhaps the parties may find it to their interest to have the matter in controversy considered and determined in the Chancery suit.

*Rule absolute, without costs.*

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### TAYLOR V. GOLDING.

*Stamp Act, 27-28 Vic. ch. 4—Construction—Penalty.*

The Stamp Act does not require an instrument to be stamped which with stamps would not be valid for some purposes; or, *semble*, which would not be a promissory note, draft, or bill of exchange.

No penalty therefore can be recovered under 27-28 Vic. ch. 4, sec. 9, for not affixing stamps to a promissory note for money lost at play, for such note under the statute of Anne is utterly void.

APPEAL from the County Court of Hastings.

Declaration, that the defendant, on or about the 18th July, 1867, and after the 27-28 Vic. ch. 4, did duly sign and deliver his promissory note to the payee, one A. Morton, in the words and figures following, that is to say: (Setting it out, being a promissory note made by defendant, payable to A. Morton or bearer three days after date, for \$40): that the said note was for the sum of forty dollars, and was made and delivered and issued within the Dominion of Canada, and within that portion of it known as the Province of Ontario, and within the County of Hastings therein. And the plaintiff further alleges, that the defendant did not nor did the said note come within any of the exemptions set forth in said Act, so as to exonerate the defendant from the penalty therein imposed and hereinafter mentioned. And it therefore became the duty of the defendant to affix to or upon the said note, at the time of the making of the said note by him, a stamp or stamps, as required by the said Act, of the value in the whole of two cents of lawful money of Canada, yet the defendant did neglect to affix, and did not affix to or upon the said note at the time of making the same, or at the time of the delivery thereof as aforesaid, or at any time after, a stamp or stamps, as aforesaid, of the value aforesaid, or of any greater value, contrary to the said statute—whereby and by force of the said statute the defendant has forfeited \$100, and an action hath accrued to the plaintiff suing as aforesaid; and the plaintiff suing as aforesaid claims as well for Her Majesty, our said Lady the Queen, as for himself, \$100.

*Plea.*—Not guilty, by statute, 21 Jac. I. ch. 4, sec. 4. At the trial it appeared that the note was given for money won at cards, and it was thereupon objected, among other grounds not material to mention, that the sole consideration being a gambling debt the instrument was utterly void and required no stamp.

The objection was overruled, leave being reserved to move upon it, and the plaintiff had a verdict. A rule was

afterwards obtained in pursuance of the leave, and after argument discharged, and the defendant appealed.

*Moss and Diamond*, for the appellant, cited 9 Anne, ch. 14, sec. 1; *Evans's Statutes*, Vol. II. p. 309; *Bowyer v. Bampton*, 2 Str. 1155; *Peacock v. Rhodes*, 2 Doug. 636; *Firbank v. Bell*, 1 B. & Al. 39; *Hutchinson v. Heyworth*, 9 A. & E. 375; *Coppock v. Bower*, 4 M. & W. 361.

*Jellett*, contra.

RICHARDS, C. J., delivered the judgment of the court.

The first section of the statute 9 Anne, ch. 14, declares that all notes, bills, bonds, judgments, &c., and other securities given, granted, drawn or executed, where the whole or any part of the consideration was for money won by gaming or playing at cards, &c., "*shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever.*"

In *Peacock v. Rhodes* (2 Doug. 636), Lord Mansfield said in effect it had been determined that a bill or note for money won at play was void in the hands of an innocent holder.

The statute 17 Geo. III. ch. 30, declares that promissory or other notes, bills of exchange, &c., of the kind referred to in that act, above 20s. or under £5, unless made and issued as there provided, "shall, and the same are hereby declared to be absolutely void, any law, statute, usage, or custom to the contrary thereof in any wise notwithstanding."

The statute 2 Geo. II. ch. 25, enacted that if any person should falsely make, forge, or counterfeit, amongst other things, any bill of exchange or promissory note for the payment of money, with intention to defraud any person, such person being lawfully convicted, should be deemed guilty of felony.

Sec. 9 of the statute of Canada, 27-28 Vic. ch. 4, is to the effect that if any person within this Province makes, draws, accepts, indorses, signs, becomes a party to, or pays any promissory note, draft or bill of exchange, chargeable



with duty under that Act, before such duty has been paid by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of one hundred dollars, and \* \* \* such instrument shall be invalid and of no effect in law or in equity, and the acceptance or payment or protest thereof shall be of no effect; except that any subsequent party to such instrument, or person paying the same, may at the time of so paying or of becoming a party thereto, pay a double duty by affixing stamps and writing his signature or initials in the manner mentioned in the Act; and such instrument shall thereby become valid.

In *Roscoe's Criminal Evidence*, at p. 527, 7th ed., it is said: "So the making of a false instrument is forgery, though it may be directed by statute that such instruments shall be in a certain form, which, in the instrument in question, may not have been complied with, the statute not making the informal instrument absolutely void, but it being available for some purposes \* \* \*: *Rex v. Lyons*, Russ. & Ry. 255. Upon the same principle a man may be convicted of forging an unstamped instrument, though such instrument can have no operation at law."

A prisoner was convicted of forging an unstamped bill, which, under 23 Geo. III. ch. 58, sec. 11, it was declared should not be pleaded or be given in evidence, or admitted in any court to be good or available in law unless stamped. The conviction was held good, as the words of the Act only meant the bill should not be made use of to recover the debt; and besides, *the holder was authorized* to get it stamped after it was made: *Rex v. Hawkeswood* (1 Leach 257); *Rex v. Lee* (Ib. 258 n).

See also *Morton's case*, (2 East P. C. 955, 1 Leach 258); *Teague's case* (Ib. 979). In these latter cases the Judges held that if the instrument forged on the face of it was such as would be valid provided it had a proper stamp the offence of forgery was complete.

In 2 *East P. C.* 948, it is thus laid down:—"It is said to be no way material whether a forged instrument be made in such a manner as, were it true, it would be of any

validity or not. But this I conceive must be understood where the false instrument carries on the face of it the semblance of that for which it is counterfeited, and is not illegal in its very frame. Upon this ground it has been adjudged that the forgery of a protection in the name of one as being a member of Parliament, who in truth was no member at the time, is as much an offence at common law as if he were so."

At page 956 of the same volume the learned editor states his conclusion in the matter as follows:—"In truth, if the matter be duly considered, the words of the Stamp Acts before mentioned can only be applicable to a true instrument; for a forged instrument, when discovered to be such, never can be made available though stamped. The Act therefore can only be understood as requiring stamps on such instruments as were available without a stamp before those Acts passed, and which would be available afterwards with a stamp."

In *Coppock v. Bower* (4 M. & W. 368), Alderson, B., said: "The statute enacts that a stamp is necessary upon an agreement 'whether the same shall be only evidence of a contract, or obligatory on the parties from its being a written instrument.' Taking the whole together, it must be implied that a stamp is unnecessary where the instrument shews no contract in law, and cannot be enforced between the parties. In the particular cases referred to, in which a stamp was required, it will be found that the agreement in each was valid as between the parties to it, though not obligatory in all respects and as to others. Now here the written papers were not obligatory between the parties, and they were put in evidence to shew what is called a void agreement, but which, under the circumstances, is no agreement at all." In that case the question raised was whether a written memorandum unstamped could be given in evidence to shew the illegality of the agreement, in accordance with which an I. O. U. was given, which was the subject of the action.

The authorities referred to go very far to shew that an

indictment for forging a note or agreement which is declared by law to be wholly void, cannot be maintained if the instrument on its face affords evidence that it comes within the statute declaring it void. It is not necessary, however, to go that length in order to hold that a penalty cannot be recovered for not putting a stamp on a void note. The dicta of Baron Alderson and the quotation last made from East's Pleas of the Crown, Vol. II. p. 956, seem to put the question on its proper footing.

Can any person be prosecuted for a penalty for not putting a stamp on a piece of paper in the form of a promissory note, which the Legislature has declared in effect is not a promissory note, and never can in fact be made a promissory note by any one? The putting of the stamp on it would not make it valid or a promissory note in law, and how then can any person be prosecuted for doing that which will not or cannot in any way profit any one? So far from the stamp on such a note doing any one any good it may enable the holder more easily to defraud an innocent third party, by making it assume on its face the form of a genuine instrument, whereas in truth it is *wholly void*.

Take the analogy of a forged bill, which of course could never be rendered valid by the putting a stamp on it; could it be held that the forger was liable to be sued in a *quittam* action for the penalty for not putting a stamp on a forged bill? We should think not.

We think, on the whole, it is the safest rule to lay down, that the Act does not require any instrument to be stamped which would not be a valid instrument for some purpose, independent of the Stamp Act, if it were not stamped; and it is probable the rule would go to the extent that such instrument must be what in law would be considered a promissory note, draft, or bill of exchange.

The instrument referred to for omitting to put a stamp on which this action is brought, is under the Statute of Anne, "utterly void, frustrate, and of none effect to all intents and purposes whatever." We do not think it an

instrument to which the stamp would give any vitality or value, and are therefore of opinion that this action will not lie against the defendant for not putting a stamp to it. The view we take renders it unnecessary to discuss any of the other points taken as grounds of appeal, the first of which was given up on the argument.

The appeal is therefore allowed without costs, and we direct that the rule to enter a non-suit in the court below be made absolute.

*Appeal allowed.*

MCINTYRE V. JOSEPH LOCKRIDGE AND WILLIAM LOCKRIDGE.

*Distress damage feasant.*

The plaintiff's horse escaped from his stable and got into defendant's pasture field, but was immediately pursued by one M., the plaintiff's son-in-law, who saw it escape, and was leading it out of defendant's field when defendant seized and detained it. The plaintiff replevied, and defendant avowed as for distress damage feasant.

*Held*, that the horse, under the circumstances, was not distrainable; and the judgment of the County Court, upholding a verdict for defendant, was reversed.

APPEAL from the County Court of Lennox and Addington Replevin for a horse.

Pleas.—1st. *Non ceperunt*. 2nd. That the horse was defendant's. 3. Avowry, that the defendant Joseph Lockridge was owner of a certain lot, and that defendant William, his servant, distrained the horse there damage feasant.

The plaintiff took issue on the pleas, and pleaded to the avowry: 1. Denying that the horse was doing damage. 2. That at the time when, &c., the horse was in the possession of one Murphy, the plaintiff's servant, and under his care and control. 3. That the plaintiff owned land adjoining defendants' land: that defendant Joseph Lockridge should have repaired the fences between them, and because the



fences were down and decayed the plaintiff's horse escaped into defendants' land, &c.

The defendant replied to these pleas: 1. That the horse was wrongfully in defendants' close doing damage. 2. Traversing the second plea. 3. That it was not the duty of defendant Joseph Lockridge to repair the fences as alleged, &c. 4. That the plaintiff's horse did not escape into defendant's land through the defect of fences which it was the duty of defendant Joseph to keep in repair. 5. That the horse at the time was doing damage through the plaintiff's neglect. Issue thereon.

From the evidence at the trial it appeared that the plaintiff's and defendant's farms were adjacent: that the plaintiff's horse escaped from his stable: that he was seen escaping by the plaintiff's daughter, who ran after him, calling to her husband, one Murphy, that the horse had escaped: that she endeavored to stop or turn the horse until Murphy came up, but the horse crossed the fence into defendant's field in spite of her: that Murphy followed, running after the horse, and caught him in defendant's pasture field, and took him by the halter and was leading him home when defendant's wife forbade him taking the horse, and called the defendant Joseph, who came up and took hold of the halter, when the other defendant came up and struck Murphy and made him let the horse go.

According to the plaintiff's witnesses the horse was not more than a quarter of an hour on defendant's premises, in the pasture field. The defendants took the horse and put him in their stable. It appeared that one of the defendants was a pound-keeper. It also appeared that the fence between plaintiff and defendants was not in good repair, and not the proper height required by the township laws. No actual damage was done, and evidence was given to shew that defendant had said so, but that he distrained on account of some personal quarrel.

From the report of the learned Judge he left the following questions to the jury:—1. Did the defendants unlawfully take and detain the plaintiff's horse? If so, there

should be a verdict for plaintiff. 2. Was the horse defendants' ? If so, there should be a verdict for defendants. 3. Was the horse taken doing damage on defendants' land ? If so, there should be a verdict for defendants. 4. Was the horse in charge of the plaintiff's servant, and in actual and corporeal possession of the servant ? If so, he was not in the field doing damage, and so the defendants should have a verdict. 5. Did the bad state of defendants' fences directly cause the damage, by admitting the horse, when if they were lawful he could not have crossed ? Then there should be a verdict for the plaintiff, for defendants would have no right to impound the plaintiff's horse for damage caused by defendants' negligence. 6. Was the damage caused by the plaintiff's negligence in not taking sufficient care of his horse ? If so, there should be a verdict for defendants, for they would in that case be justified in impounding the horse doing damage by the plaintiff's neglect.

The jury found a general verdict for defendants.

In the following term the plaintiff obtained a *rule nisi* to set aside the verdict on several grounds, among others, that the verdict was contrary to law and evidence and the weight of evidence, and perverse : that several questions of fact were left to the jury, and they were not asked how they found upon them : that questions of law were improperly left to them, which the Judge should have directed them on if they found facts ; and for reception of improper evidence which was objected to at the trial ; and for non-direction ; and on grounds taken and raised at the trial.

The rule being argued the learned Judge gave judgment, ordering that the *rule nisi* should be discharged without costs to either party, if the defendants should consent that the verdict rendered for them so far as the second issue joined was concerned should be set aside, and a verdict on that issue be entered for the plaintiff.

Against that judgment the plaintiff appealed.

*K. McKenzie*, Q. C., for the appellant, cited *Field v. Adams*, 12 A. & E. 649 ; *Wormer v. Biggs*, 2 C. & K. 31 ; *Ch. Arch. Prac.* 11th ed. 1517.

*Holmested*, contra, cited *Wood v. Nunn*, 5 Bing. 10; *Swann v. Earl of Falmouth*, 8 B. & C. 456; *Clement v. Milner*, 3 Esp. 95.

MORRISON, J., delivered the judgment of the court.

It appears very clearly from the evidence given at the trial that the horse in question escaped from the plaintiff's stable and ran into the defendants' close in spite of the plaintiff's daughter, who saw it escape from the stable: that immediate pursuit was made by Murphy, and the horse retaken, and while being led out of defendants' pasture field, the defendants forcibly took the horse out of the possession of the plaintiff's servant. Such are the main facts; and applying them to the issues, irrespective of the law, to which we shall hereafter refer, the learned Judge should have directed the jury to find the first two issues for the plaintiff, instead of leaving them as stated according to the appeal book.

The simple question on the plea of *non ceperunt* was, whether the defendants took the horse or not. Leaving it to the Jury to say whether the defendants *unlawfully* took and detained the plaintiff's horse, and in such case to find for the plaintiff, was liable to mislead the jury, and involved the alternative that if the defendants took the horse lawfully to find against the plaintiff—in other words, leaving it to them to determine the question of law.

As to the other issues, more particularly the third and fifth, the same observation applies.

The whole question at the trial was whether the defendant Joseph was justified in distraining the horse. *Comyn*, in his work on Landlord and Tenant, p. 389, after treating of the right to distrain where fences are defective, says: "And in all cases, if the owner make fresh pursuit and immediately endeavor to bring back his cattle, they are not distrainable," and he refers to *Reynolds v. Okeley*, (Brownl. 170); and when we refer to that case we find that there the closes of the plaintiff and defendant were adjoining: that the plaintiff's cattle escaped into

defendant's close, and the plaintiff presently followed the cattle, and before he could drive them out defendant distrained them. The court held that, because the beasts were always in the plaintiff's possession and in his view, the defendant could not distrain the cattle.

And in *Storey v. Robinson et al.* (6 T. R. 138), the defendants distrained a horse damage feasant, on which the owner was riding. Lord Kenyon said: "This distress cannot be supported. Such a distress is illegal. If it were permitted to a party to distrain a horse while any person is riding him, it would perpetually lead to a breach of the peace." And it is laid down in *Brady on Distresses*, 207, "Whatever is in a man's present use or occupation, is during that time privileged from distress; as a horse on which he is riding. \* \* \* This rule extends even to the case of a distress damage feasant."

The reason is also apparent, irrespective of the danger to the peace, for Lord C. B. Gilbert says: "It is highly reasonable that the owner of the land should defend himself from injury by driving out the beasts, and likewise by detaining the thing that did the injury in a public pound, till compensation be made for the trespass; for otherwise *he might never find the person* whose beasts committed the trespass:" *Gilbert on Distress*, 21.

And in *Field v. Adames et al.* (12 A. & E. 649), where the plea justified the taking of the horses damage feasant, and the replication was that they were at the time in the actual possession of the plaintiff and his servant, and under his personal care, &c., to which the defendants rejoined that they were at the time wrongfully in defendant's close doing damage, and the plaintiff demurred, the court, without hearing the plaintiff, held that the allegation in the replication was clearly sufficient, and that the rejoinder gave no answer. Lord Denman said: "The principle is the general danger to the peace in such cases." Comyn makes a like remark, (page 388): "Which exemption arises from the anxiety with which the law guards against any incitement to a breach of the peace"; and the case before us



exemplifies the wisdom of the law, for here the mischief actually occurred which it was intended to provide against.

We may here also refer to a recent decision, *Goodwyn v. Chevely* (4 H. & N. 631), where it was held that where cattle passing along a highway stray into an adjoining field through defect of fences, the owner of the cattle has a reasonable time to remove them before the owner of the field can distrain them doing damage. It would indeed be a very unreasonable law, that if a man's horse ran away from him and into a field, and although he instantly pursued him and caught him and was leading him out, that the owner could under such circumstances take him as a distress damage feasant, irrespective of the principle of avoiding a breach of the peace.

On the whole we cannot allow this verdict to stand, which would entitle the defendants to a return of the horse, while it is very clear they ought never to have taken him. It is very evident that the defendants were impelled in seizing the horse from personal feeling against the plaintiff, and probably the fact that one of the defendants was pound-keeper suggested the unneighbourly act, and in a case where the damage could not be to the value of two pence, as said by the learned Judge. The plaintiff had no immediate remedy except replevin or paying some amount to release his horse, which he could not recover back : *Lindon v. Hooper*, (Cowp. 414). It is to be hoped that these parties will not further litigate this trifling matter, and that they will in some way amicably settle it.

Appeal allowed, the court below to make the rule absolute for a new trial without costs.

*Appeal allowed.*

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## BLANCHARD V. SNIDER.

*Reference—Construction of as to matters referred—Entering judgment on award.*

At *nisi prius* a certain question of fact in a cause was left to the jury, a verdict was taken for 1s., and the other questions involving matters of account, it was ordered that "the plaintiff's claim in this cause, and all matters in difference between the parties in this cause, except the question decided by the jury, be referred to P. L., with power to increase the verdict or order a verdict to be entered for the defendant," who had pleaded a set-off. On motion against the award it was objected that this was a reference of all matters in dispute between the parties, and therefore unauthorized.

*Seemle*, that it referred only the matters in dispute in the cause; but it was clear that nothing more was intended or had been considered by the arbitrator, and no objection had been made to the order; and *Held*, therefore, that if necessary the order would be amended.

Where a verdict is taken and the award not made until after the next term, the plaintiff need not wait to enter his judgment until after the first four days of the term following the award.

*Wallbridge*, Q. C., obtained a rule calling on the plaintiff to shew cause why the order of reference made in this cause, and the rule made thereon, and the award made by the arbitrator, and the judgment entered in this cause thereon, should not be set aside, on the following grounds, amongst others: that the order of reference made at the trial exceeds the power of the Judge to make it, in this, that the reference was compulsory, and was made of all matters in difference between the parties, and not confined to the matters in the particular suit, and that the Judge did not so intend to make the said order; or to set aside the award, on the ground that it is made of and concerning all matters in difference between the parties in the cause, and is not confined to matters in the suit; or why the judgment should not be set aside, being entered before the first four days of the term following that in which the award was made.

There were other objections taken, depending upon the merits of the case, which it is not material to report.

The rule was drawn up upon reading the Judge's order of reference, and the rule making it a rule of court, the record, award and affidavit of execution thereof, and affidavits filed.

A. N. Richards, Q. C., *Fitzgerald* with him, shewed cause, applying also to amend the order of reference. He cited *Smith v. Muller*, 3 T. R. 624; *Slack v. McEathron*, 3 U. C. R. 184; *Cromer v. Churt*, 15 M. & W. 310; *O'Toole v. Pott*, 7 E. & B. 102; *Russell* on Awards, 3rd ed., 686, 82, 83; *Ch. Arch. Prac.*, 12th ed., 1706.

*Wallbridge*, Q. C., supported the rule, citing *Russell* on Awards, 2nd ed., 765, 652, 653; *Lund v. Hudson*, 1 D. & L. 236; *Crosbie v. Holmes*, 3 D. & L. 566; *Dresser v. Stansfield*, 14 M. & W. 823; *Re Ingersoll and Ellwood*, 3 P. R. 167; *Williams v. McPherson*, 2 P. R. 49.

It appeared that this case was called on for trial at the spring Assizes, 1868, at Picton, before Adam Wilson, J., when it was arranged that it should be left to the jury to determine the fact whether the defendant or his son acted as agent of the plaintiff, the plaintiff being a stage proprietor and in this action charging the defendant as being his agent, and as such having received stage fares for him. The jury found the point against the defendant, and a verdict was taken for a shilling, and the following order was drawn up by the learned Judge :

A jury being empanelled, and having found a verdict for the plaintiff for one shilling, subject to the award of Philip Low, Esquire, as hereafter mentioned, and it appearing to me that all the other questions arising in this cause involve matters of account, which cannot be conveniently tried before me by a jury, I do order that the plaintiff's claim in this cause, irrespective of the question of agency and all matters in difference between the parties in this cause, except the question decided by the jury, be referred to Philip Low, Esquire, Barrister, with power to increase the verdict, or order a verdict to be entered for the defendant, &c.

MORRISON, J., delivered the judgment of the court.

[After stating the facts and discussing the objections turning upon them, which were held not entitled to prevail.]

Then as to the first ground taken in the rule, that the learned Judge exceeded his power, and that he did not

intend to refer the suit as well as all other matters in difference between the parties. It is quite clear that it was never the intention of the learned Judge or the parties that any other matters than those in dispute in the cause should have been referred. We cannot say that the phraseology of the order shews that their intention was otherwise. The text writers, such as *Russell*, 117, *Watson*, 11, say that if it is proposed to dispose of nothing but the questions in the action, the phrase "all matters in difference in the cause between the parties" is the proper mode of expressing it, as was suggested by the court: *Smith v Muller*, 3 T. R. 624; and if to settle all other matters, then "all matters in difference between the parties in the cause" is the proper expression, and that these phrases are well known in the profession; but, we take it, if from the whole reference we can see that it was only intended to refer the matters in dispute in the cause, that such was the fact, and that the arbitrator and the parties acted assuming that to be the case, and that only such matters were in fact investigated, the complaint of the defendant under such circumstances would not be meritorious; and on an application to our discretion we would not disturb the award on account of any ambiguity in the wording of the order of reference.

When we examine the order we find the reference is, "that the plaintiff's claim in this cause, irrespective of the question of agency, and all matters in difference between the parties in *this* cause, except the question decided by the jury, be referred," &c., "with power to increase the verdict or to enter a verdict for defendant." The defendant pleaded a set-off, which would come under all the other matters in this cause besides the plaintiff's claim. Critically speaking, we think, taking all the words together, they shew that it is only a reference of the matters in the cause, with the exception of the question found by the jury; but be that as it may be, if necessary we could amend the Judge's order so as to make it conform to and be what the learned Judge and the parties intended it to



be and assumed it to be, as no objection at any time was made to the phraseology of the order or its illegality.

The only other question to be disposed of is the last ground taken : that the judgment was entered before the first four days of the term following that in which the award was made. That objection is fully met by the case of *Cromer v. Churt* (15 M. & W. 310), which shews that if a verdict is taken subject to an award, that if the award is made after the term following the verdict, that final judgment may be signed at once, and that the plaintiff is not bound to wait until after the expiration of the first four days of the term following the award. Here the verdict was taken on the 1st May, 1868, the following term, of Easter, ended on the 6th June, and this award was made on the 30th June, and judgment entered on the 11th July. The rule will therefore be discharged.

*Rule discharged.*

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### HATCH V. HOLLAND, ET. AL.

*Construction of count—Trover or trespass—Plea of justification—Averment of identity of goods.*

*Semble*, That a count charging that the defendants took and converted to their own use and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, might be treated as in trover, not trespass ; and a justification therefore might be proved under not guilty. To a second count, in trespass, defendants avowed under a distress for rent alleging that the plaintiff fraudulently removed certain of his goods, from the demised premises, whereupon defendant took the said goods in the second count mentioned.

*Held*, On demurrer, reversing the judgment of the County Court, that the plea was good, and not open to the objection that the goods taken were not shewn to be the goods fraudulently removed.

Remarks as to the refusal in the Court below to allow not guilty and a justification to be pleaded to the first count.

APPEAL from the County Court of Kent. The declaration contained two counts. The first, for that the defendants took and converted to their own use, and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods : to wit, one gold watch and chain, and one

other watch and chain. The second, for that the defendants seized and took the plaintiff's goods, that is to say, one gold watch and chain, and one other watch and chain, and carried away the same, and disposed of the same to their own use.

The pleas were—to the first count, 1st. not guilty; 2nd. goods not the plaintiff's. To the second count, 3rd. That before the alleged trespasses the plaintiff held certain premises, as tenant thereof to the defendant Peter Falardeau, under a demise, &c., and \$15 of the rent, for five months of the tenancy, were then due; and the plaintiff had fraudulently and clandestinely carried off from the said premises certain of his goods, to prevent Peter Falardeau from distraining the same for said arrears of rent, and placed the said goods in the messuage of one John L. Sigsbee, contrary to the statute; whereupon defendant Carroll, as bailiff of Falardeau, while the rent remained due, and within thirty days next ensuing such carrying off of the said goods, entered into the said messuage of Sigsbee to take and then and there took the said goods in the second count of the said declaration mentioned, then being found, as a distress for the said rent, and removed the same, and at the expiration of five days from such distress the defendant Falardeau caused the said goods to be appraised, and the defendant Williston, as the auctioneer of Falardeau, then sold the same by virtue of such distress, according to the statute, in satisfaction of the said rent and the costs of distress and sale, to the defendant Holland, as the highest bidder, which are the alleged trespasses.

Replication—Joinder of issue on the first and second pleas.

Demurrer to the third plea, because the plea does not shew that the goods mentioned in the declaration were fraudulently or clandestinely removed to avoid or prevent a distress, so as to enable the defendants to justify the seizure; and because the plea is framed more to an action for trespass to land than to goods, and contains no sufficient matter in confession and avoidance or justification of the acts complained of.

The defendants joined in demurrer.

The cause was tried in September last, when a verdict was found for the plaintiff, and \$95 damages.

In the following Term the defendants moved for a non-suit, or for a new trial, which on argument was discharged, on condition of the plaintiff reducing the verdict to \$45.

The defendants appealed from this decision, on the ground that the county Judge should have directed the jury that the defendants were entitled under the pleadings to the first count to justify the seizure of the goods as a distress for rent; and because he improperly rejected evidence of such a justification; and upon other grounds stated in the rule *nisi*.

The demurrer was also argued, and the judgment upon it was as follows:—"Plea of justification was evidently framed from the form justifying the entering of premises to distrain in an action of trespass *quare clausum fregit*, wherein it is not necessary to identify particular goods. This plea attempts to justify the taking of certain goods, but does not aver them to be the goods for the taking and converting of which the plaintiff declares he is entitled to damages, and is therefore clearly bad. Judgment for plaintiff on demurrer."

The defendant appealed from this judgment on the ground that the plea is good in law, and shews a good defence to the action.

*Robinson, Q. C.*, for defendants. As to the demurrer, the plea, excepting as to the allegation of sale, is precisely the same as in *Bullen and Leake's Precedents*, 618. The plaintiff asserts that the plea does not state that the goods taken were those which had been fraudulently removed, or that they are the same goods which the plaintiff by his second count charges to have been taken. But the plea does state that the goods taken were those mentioned in the second count, and were those that had been fraudulently removed. It may be read as follows: "entered into the said message of Sigsbee to take, and then and there took the said goods"—then put a comma after *goods* and proceed,—“in the second count mentioned;” or after the word *goods*

presume the additional words, "*which are the goods in the second count mentioned,*" or, "*being the goods in the second count mentioned;*" and the tenor of the plea will warrant the supposal of such words : *Brancker v. Molyneux*, 1 M. & G. 710 ; *Ashton v. Brevitt*, 14 M. & W. 106 ; *Grattick v. Phillips*, 9 Bing. 722 ; *Rex v. Boyce*, 4 Burr. 2083 ; *Metropolitan Association v. Petch*, 5 C. B. N. S. 510 ; *Stephen* on Plg., 6th ed., 313, and cases there cited. These authorities shew that the exception, if there be room for it, can only be taken by special demurrer, and that the pleading will be construed so as to give it a sensible meaning and application.

As to the rule,—If the first count be in trover, the defendants were at liberty at the trial to go into their full justification of a seizure by distress for rent, for in trover the pleas of not guilty and not possessed are equivalent to the general issue before the pleading rules were passed : *Bullen & Leake*, 591, 606, notes ; *Whitmore v. Greene*, 13 M. & W. 104. *Young v. Cooper*, 6 Ex. 259. *Unwin v. St. Quintin*, 11 M. & W. 277.

*Harrison*, Q. C., and *Atkinson*, contra. It is not denied that if the first count be in trover, the justification referred to may be proved under the present pleas ; but it is contended this count is not in trover, but in trespass, and therefore the justification is of no avail, because it has not been specially pleaded. But if the justification had been pleaded, or could have been relied upon, the facts proved shewed the defendants altogether failed to establish it. The watch got from Sigsbee was no part of the goods that are alleged to have been fraudulently removed by the plaintiff, and it is not pretended it was a part of them : *Inkop v. Morchurch*, 2 F. & F. 501 ; *Dibble v. Bowater*, 2 E. & B. 564 ; *Woodfall*, L. & T. 421, 422. This Court will not interfere with the discretion of the Judge below : *McKinistry v. Furby*, 24 U. C. R. 176 ; *Harris v. Robinson*, 25 U. C. R. 247.

ADAM WILSON, J., delivered the judgment of the court.

Whether the first count be in trover or trespass does not



matter in this case, because the facts proved shew the defendants had no right to take the watch from Sigsbee's custody, which is the only article in question, for the rent in arrear. The watch had not been fraudulently removed from the demised premises at all. Sigsbee was a watch-maker; the watch was left with him to repair; he did some work on it, and charged a dollar for it. The bailiff got the watch from him, paying him his charge, and sold it to satisfy the rent.

If it had been material to consider the form of the count, we might have thought it capable of being supported as a count in trover.

The proper form of a trespass count is, that the defendant "seized and took the plaintiff's goods, and carried away the same," and that he disposed of them to his own use, or damaged or destroyed them. The proper form of a trover count is that the defendant "converted to his own use," or that he "wrongly deprived the plaintiff of the use and possession of" his goods.

"Taking" the plaintiff's goods, without saying also that the defendant seized them, would describe a trespass; but we are not sure that the statement superadded to the taking, that the defendant "converted them to his own use," might not also be considered a count in trover.

Trover may be brought for the taking, that is, founded on a taking, as well as a wrongful keeping of the plaintiff's goods: 2 Saund. 47; *Cooper v. Chitty*, (1 Burr. 31, 33); but the taking is not the act complained of, it is the wrongful conversion. In *Pitt v. Gaince*, (1 Salk. 10), the count was that the defendant *entered and seized* the ship of which the plaintiff was master, and detained her, "by which the plaintiff was hindered and obstructed in his voyage;" and it was held that as the master had not the property in the ship, and had not declared on his possession, but only on his being master, that the count was in case; but he might have declared in trespass if he had counted on his possession.

In *Smith v. Goodwin*, (4 B. & Ad. 413), a count that the defendant wrongfully, injuriously and vexatiously made a

second distress, and again *took* the said goods, and withheld them from the plaintiff, and converted them to his own use, was held an informal count in trover.

Lord Denman, C. J., said, "Though the taking of the plaintiff's goods a second time was a trespass, he was at liberty to waive it, and bring case for the consequential injury arising to him from the unlawful detention of his goods." Parke and Patteson, JJ., thought the count alleged in substance that the goods came to the possession of the defendant, and that he refused to deliver them, and converted them to his own use. Littledale, J., thought the word *vexatiously* made it a count in case.

In *Williams v. Holland*, (10 Bing. 112), it was held that case will lie though the act be *immediate* from which the injury by negligence results, and that trespass will also lie.

In *Weeton v. Woodcock*, (5 M. & W. 594), Parke, B., said, "Where there is a direct injury and also a consequential damage, that may form the subject-matter either of case or trespass."

The count in the present case is, that the defendants "took and converted to their own use, and wrongfully deprived the plaintiff of the use and possession of his goods." The complaint is not that the defendants *took* the goods, stating a substantive act, and then that they converted them, but that they both took *and* converted the goods, so that the conversion may have been the taking: *Per* Holroyd, J., in *Moreton v. Hardern*, (4 B. & C. 228). But the count proceeds further, and states that the defendant "wrongfully deprived the plaintiff of the use and possession of his goods," which is the very language of the count in trover.

We think this may be taken to describe a cause of action in case, and to be a form in trover. The plaintiff has so treated it, for he has marked "count in trover," on the margin of his record.

But notwithstanding this, it does not help the defendants, for the reason before stated.

Then as to the demurrer, it is said in *Brancker v. Moly-*

*neux*, (1 M. & G. 710), in the head note, "If in a pleading subject A is mentioned, and then subject B, and afterwards a statement is made respecting 'the last-mentioned subject,' the court will refer the words 'last-mentioned' to A, where by referring them to B. an incongruity would be occasioned, and where the opposite party, instead of demurring on the ground of ambiguity, has pleaded over." This kind of ambiguity was ground only of special demurrer : *Ashton v. Brevitt*, (14 M. & W. 106). The other cases cited are also applicable to this point.

The plea is pleaded to the second count. It alleges that the plaintiff fraudulently removed *certain* of his goods, and placed the said goods with Sigsbee, and that Carroll, as bailiff, took the *said* goods in the second count mentioned, which are the alleged trespasses.

We think, consistently with the foregoing cases, the plea should be read as the pleader plainly intended it to be read—that the certain goods which were fraudulently removed and afterwards taken, were the goods in the second count mentioned. The plea is capable of this construction, and should therefore receive it. This meaning is more properly the one that should be given to it than the one which the plaintiff contends it should have. The plaintiff asserts that the only construction which can be put upon the plea is, that the defendants seized the goods in the second count because the plaintiff fraudulently removed *certain* of his goods to avoid the distress. This, we think, is not the fair effect and intent of the plea, and if it was thought to have been embarrassing by reason of its ambiguity the plaintiff might have had it amended.

It only remains to notice the statement on the appeal book furnished to us, that the learned Judge of the County Court refused to allow the general issue to be pleaded to the second count along with the special plea, both before and at the trial, and to plead the justification to the first count.

As the case has resulted, the refusal has been no injury to the defendants. We only notice it now because it seems

quite too rigid an exercise of the discretion with which he is entrusted.

The rule is to allow every plea to be pleaded which fairly and reasonably appears to be necessary to let in the full defence on the merits. At times the Judge may question the necessity of some particular plea which is proposed to be pleaded. He may think it unnecessary because the same matter can be proved under another plea already allowed, or he may think it objectionable in law, and calculated to cause delay or expense ; but if he entertain a doubt whether the benefit of the plea proposed can be had under the plea allowed, or whether the plea is good in law or not he usually allows it to be pleaded if it be a necessary plea on the merits. We cannot understand why the learned Judge should have refused to the defendants their most reasonable application to plead the pleas which they desired to plead.

The special plea to the first count was absolutely necessary for the defendants' protection if the count were one in trespass, and if it were even doubtful whether it was or not, it should have been allowed, or allowed unless the plaintiff would consent to strike out the objectionable and embarrassing word *took* in that count.

We are of opinion the judgment on demurrer must be reversed, and that the learned Judge should be directed to give judgment upon it in favor of the defendants, and that the rule must remain absolute, and the appeal as to it be dismissed.

As there are separate appeals upon the rule and upon the demurrer, and one party has succeeded on the one appeal and the other party on the other appeal, there will be no costs of either appeal to either party.

*Rules accordingly.*

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## ROBERTSON V. STRICKLAND ET AL.

*Agreement to supply timber—Construction—When property vests.*

M., by agreement with the defendants, agreed to manufacture for and supply to them certain timber, which he was to mark with defendants' name and deliver at one or two places on Sturgeon lake, to boom it securely, and complete the delivery by a day named. Defendants were to pay two-thirds of the contract price as the work proceeded, and the rest on completion of the contract. No rough, coarse or cull timber was to be accepted, and the timber was to be measured by defendants when delivered, or from time to time, M. to have it measured by a culler if not satisfied with defendants' measurement, and the expense thereof to be borne equally.

The timber was made by M. from his own trees, marked by him with defendants' name as made, and hauled to the lake and boomed there; but it had not been measured or accepted by defendants, nor delivered to them, nor dealt with by them as their own. They had made advances from time to time, but there was a disputed balance claimed by M.

M., under these circumstances, put the men he had employed in manufacturing the timber in possession of it, as security for their wages. Defendants took it out of the possession of the plaintiff, one of the men, and the plaintiff brought trespass:

*Held*, that the property in the timber had not passed to the defendants, and that the plaintiff therefore could recover.

But *Seemle*, that in equity defendants would have a prior claim upon it to the extent of their advances.

APPEAL from the County Court of the County of Peterborough.

The declaration contained a count in trespass for taking timber, and common money counts.

Defendants pleaded not guilty and not possessed to the first count, and never indebted and payment to the second count.—Issue.

The verdict was for the plaintiff.

The defendants obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit or verdict entered for defendants, or why a new trial should not be granted, which rule was afterwards discharged, and against this decision defendants appealed.

The evidence was as follows:—By agreement made on the 18th of December, 1867, between Robert Macdonald and defendants, Macdonald was to manufacture for defendants during that season 700 pieces of square timber, in the township of Verulam, and to mark each stick as made with mark

S. & B., being the trade-mark of defendants, and to deliver the timber at some convenient place or places, not exceeding two places, on Sturgeon lake, and to boom the same securely, and to complete the delivery of all the timber made on or before the 1st of April thereafter, for the sum of, &c., &c. No rough or coarse timber, nor any culls of any description, to be accepted or paid for: all the timber was to be neatly pointed and sound, and to be measured by defendants when delivered, or from time to time as the work proceeded. If Macdonald was not satisfied with such measurement, he might have the timber measured by a duly qualified culler, half of which expense was to be borne by each party. Defendants were to make advances of cash and supplies from time to time to Macdonald as the work proceeded, in proportion of two-thirds of the value of the work done, and to pay the balance on completion of the contract. Macdonald was also to deliver all rafting material necessary for rafting the timber on the ice, or convenient for rafting, free of cost to defendants: defendants to cut the rafting material.

Macdonald was called as a witness, and said:—Plaintiff worked for witness as a hewer, in getting out the timber. Timber was put by witness's men on the ice on Sturgeon lake for witness—got over 500 pieces by 17th of March—men were paid by defendants. Witness on the 9th of April gave the following order to the men:—"I hereby give the men that manufactured the timber made for me on lots 24, 25, 26, in the sixth concession of Verulam, in security for their wages, and the men that were employed with their teams, for their wages, and they are to give me possession of it when they get their wages." It was signed by the witness.

Witness gave an order on defendants in favor of the plaintiff, for \$81.15, for his wages, on which the plaintiff got \$30. Witness gave possession of the timber to the men about 9th of April; it had never been delivered to defendants. Witness put the men in actual possession of the timber: plaintiff was not present when the agreement of the 9th of April was drawn: he agreed to it afterwards. Witness

told the men to keep the timber until they were paid: the timber was boomed with other timber before the men got it. With the exception of \$50, all money paid to the men was paid by defendants. This timber was marked in defendants' name as it was made: it was witness's own timber: defendants paid for the lots on which it was cut, out of the contract price, and charged it to witness.

Hector Macdonald said:—Plaintiff came next day after possession of the timber was obtained, and he was then in possession every night: he remained there till defendants took possession of the timber by force. Defendants took the timber by force on 23rd of April: plaintiff was there. When defendants took the timber plaintiff went ashore.

Several objections were taken by defendants' counsel at the close of the plaintiff's case, and leave was reserved to move to enter a non-suit or verdict on the whole case.

Some evidence was given for defendants.

The jury found that the plaintiff went into possession of the timber with his fellow-workmen, and accepted of the agreement under which Macdonald gave them possession, and that the defendants took forcible possession of the timber while the plaintiff was in possession; and they found for the plaintiff, with \$52 damages, the balance of his wages.

A rule *nisi* was moved and discharged as before-mentioned.

The learned Judge, in disposing of the rule, stated that defendants' counsel at the trial took four objections:

1. That the plaintiff could take no benefit from the agreement between Macdonald and his men, not being present at the time, nor in possession of the timber until after the other men were put in possession.

2. That the property in the timber vested in defendants under the agreement as soon as it was made and marked, at any rate when it was drawn on the ice.

3. That if Macdonald had possession of the timber, it was only a lien, and could not be transferred; and

- 4th. That the plaintiff never was in possession, coupled with a beneficial interest.

And he stated as his decision that the finding of the jury disposed of the first and fourth objections, and that the second and third objections raised questions of law under the agreement and evidence: that the evidence shewed the timber was never ready for delivery; it had not been measured and accepted; it was not a mere lien Macdonald had which he could not transfer; the property in the timber was vested in him, and although marked with defendants' mark they had no right to treat it as their own until measured and accepted. The rule was therefore discharged, The case was argued in Michaelmas Term last.

*Scott* for defendants. The evidence shews defendants had legal possession of the timber when it was at Sturgeon lake: *Logan v. LeMesurier*, 6 Moore P. C. 116; *Supple v. Gilmour*, 11 Moore P. C. 551. The effect of the contract was to vest the property in the timber in defendants as soon as it was manufactured: *Clarke v. Spence*, 4 A. & E. 448; *Short v. Ruttan*, 12 U. C. R. 79; *Woods v. Russell*, 5 B. & Al. 942; *Wood v. Bell*, 5 E. & B. 772. The large proportion of the value of the timber that was paid by defendants, and had to be paid according to agreement, and the marking of the timber with their name, afforded additional evidence of and argument for the property having become vested in them as soon as it was manufactured and marked: *Burton v. Bellhouse*, 20 U. C. R. 60; *Blackburn* on Contract of Sale, 160; *Atkinson v. Bell*, 8 B. & C. 277; *Dempsey v. Carson*, 11 C. P. 462. Delivery was never made to the plaintiff as one of the men; he was not present when it was delivered to the men by Macdonald. Plaintiff had no right to recover on the common counts.

*C. S. Patterson*, contra. This is one of several cases depending on the decision in this case. The delivery by Macdonald was made to the men who were present for all the men who had claims against him for work done on the timber. The plaintiff was one of the men who had claims, and though not present when the delivery was made, it was made for him as well as for those who were present, and he



assented to this the day after by taking possession of the timber, and keeping possession till it was forcibly taken by defendants. The timber was the property of Macdonald when he delivered it to the men. He could not before delivery to the men have maintained an action against defendants for goods sold and delivered: *Elliott v. Pybus*, 10 Bing. 512; *Atkinson v. Bell*, 8 B. & C. 277. Macdonald had then still something to do to the timber before the property in it passed to defendants; and during all that time it was at his risk. He had to mark it, deliver it at Sturgeon lake and boom it there, and even then defendants had to measure and accept it before it could be said it was their property: *Logan v. LeMesurier*, 6 Moo. P. C. 116. In *Supple v. Gilmour*, 11 Moo. P. C. 551, the contract was complete; see, also, *Edgar v. The Canadian Oil Co.*, 23 U. C. R. 333. Property in a barge has been held not to pass though the party's name was painted on it: *Mucklow v. Mangles*, 1 Taunt. 318. The property passed to the men by the delivery, and there was also a good consideration for it: *The Queen v. Carter*, 13 C. P. 611. *Woods v. Russell*, 5 B. & Al. 942, is disapproved of in *Wood v. Bell*, 6 E. & B. 355. As to property passing, he referred to *Bank of U. C. v. Killaly*, 21 U. C. R. 9; *Paton v. Currie*, 19 U. C. R. 388; *Middlebrook v. Thompson*, 19 U. C. R. 307; *McMillan v. McSherry*, 15 Grant, 133; *Carruthers v. Reynolds*, 12 C. P. 596.

ADAM WILSON, J., delivered the judgment of the court.

In determining these intricate questions as to what acts are sufficient between the parties to transfer property in a chattel not made at the time of contract, but made afterwards, and upon which the asserted vendee pays money, and the party called the vendor puts the vendee's name on it, and takes it to a particular place pointed out for delivery, but does not deliver it, and also whether the fact of something still remaining to be done before the alleged vendee can be compelled to accept the article, and when, if at all, such change of property is effected,—we must ascertain clearly what the precise facts of the case are before we can

apply with confidence the rules of law as settled by so many decisions, which are not always concordant, and are at times distinguished by some very minute circumstances of difference.

The agreement between the parties was, that Macdonald should supply to and manufacture for defendants a quantity of timber in the township of Verulam, and the evidence shews the trees from which the timber was to have been made were the property of Macdonald. He was to mark each stick with defendants' name; and he was to deliver the timber at some one or two convenient place or places on Sturgeon lake, and boom it securely, and complete the delivery by the 1st of April thereafter. Defendants were to pay two-thirds of the contract price as the work proceeded, and the rest on completion of the contract.

No rough, coarse or cull timber was to be accepted by defendants, and all the timber was to be neatly pointed and sound, and was to be measured by defendants when delivered, or from time to time as the work proceeded; and if Macdonald were not satisfied with the measurement, he might have the timber measured by a qualified culler, the expense of which was to be borne by the parties equally.

The evidence shews the timber was marked by Macdonald with defendants' name as it was made, and that it was hauled to Sturgeon lake, and boomed by him with other timber before the men got it on the 9th of April. There was no evidence of any measurement having been made of it at that time, nor of any plain act of acceptance or special dealing by defendants with the timber as their own. The trees were unquestionably the property of Macdonald from which the timber was made, and so was the timber as a consequence while in process of manufacture.

If it ceased to be his, and was transferred to the plaintiff, it must have been by the marking of each stick as it was made with the defendants' name, and which Macdonald was bound to do, or by that and the hauling it to and booming it at Sturgeon lake, which he was also bound to do by the agreement.

The general rule is, that when a man contracts with another to make an article for him at a given price, in the absence of all circumstances from which a contrary conclusion may be inferred, no property passes in the chattel until it be completed and ready for delivery. On the other hand, where a bargain is made for the purchase of an existing ascertained chattel, the general rule, in the same absence of opposing circumstances, is, that the property passes immediately to the vendee: that is, that there is at once a complete bargain and sale. But these general rules are both and equally founded on the presumed intention of the parties: per Lord Campbell, C. J., in *Wood v. Bell*, (5 E. & B. 791.)

In *Logan v. LeMesurier*, (11 Jur. 1091, 6 Moore P. C. p. 118), Lord Brougham said:—"The question must always be, what was the intention of the parties, and that is, of course, to be collected from the terms of the contract. If those terms do not shew an intention of immediately passing the property until something is done by the seller, before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done."

There is a difference between unascertained goods and goods ascertained though not finished; and the general rule is that the property does not pass while anything remains to be done by the seller, either to complete the goods or to ascertain the price; but parties can pass the property in goods whether finished or not, if such was their intention: *Young v. Matthews*, (L. R. 2 C. P. 127).

The mere putting the name of the person who orders goods to be manufactured for him upon such goods, does not pass the property to him: *Mucklow v. Mangles*, (1 Taunt. 318); and where culling and measurement had to be made the property did not pass: *Paton v. Currie*, (19 U. C. R. 388).

In *Baker v. Gray*, (17 C. B. 462), it was provided that after the first instalment paid on a ship to be built, the property in it should be vested in the person for whom it

was building, and that he should have power to finish it if the builder made default.

And in *Wood v. Bell* (5 E. & B. 772), it was decided that the property in an unfinished vessel might pass to the vendee, if it were the intention of the parties that it should pass; and the circumstances of intention from which it was inferred the property had passed, were :—

1. The payment for the work as it proceeded, by instalments.

2. That the plaintiff, who was the person for whom the vessel was building, had by agreement the work done under the supervision of his own agent, and according to his specifications, from which it seemed the builder was not to have the power of transferring the article to any one else.

3. The marking of the plaintiff's name on the keel of the vessel, at the plaintiff's request, for the express purpose of securing the vessel to the plaintiff; and

4. The admission by the builder that the vessel was the plaintiff's.

It was said that though some of these circumstances singly, or perhaps less than all of them, might not have been sufficient evidence of a transfer of property, yet the whole of them combined were evidence of such a transfer having been effected. In *Wood v. Russell*, (5 B. & Al. 942), and *Clarke v. Spence*, (4 A. & E. 448), the first three provisions were held sufficient to pass the property. It was decided in the same case that engines and other parts of the vessel adapted and intended for it, but not attached to it, passed also.

In the Exchequer Chamber, (6 E. & B. 355), the former part of the judgment, as to the unfinished vessel, was affirmed, but the latter part of it, as to the unattached articles, was reversed.

In *Turley v. Bates* (10 Jur. N. S. 368, 2 H. & C. 200), it is said the rule that no property passes where anything remains to be done to the subject-matter of the contract by the terms of the contract, does not apply where it appears to have been the intention of the parties that the property



should pass notwithstanding, and that the rule only applies where something remains to be done by the *seller*.

A delivery of goods on board the vendee's ship will not pass the property of such goods in him, if the sale were subject to the condition of his paying cash for them before he got the bill of lading : *Moakes v. Nicolson*, (19 C. B. N. S. 290).

The object of marking the timber with the defendants' name was no doubt to identify the different pieces which were made under their contract, and it was evidence also of an intent by Macdonald to transfer the property in it to them, if that intent was consistent with the other provisions of the agreement. The fact that large advances were made from time to time upon the timber would be consistent with this intent, for the marking might shew that it was done for the purpose of giving the defendants a security upon the timber for their advances. The delivery and booming at Sturgeon lake are also consistent with this intent.

The facts which are inconsistent with the property passing to the defendants, are:—Firstly, that there was, as it appears to us, an unpaid or at any rate a disputed balance claimed by Macdonald,—this would not be sufficient of itself; Secondly, that the defendants were not bound to accept of rough, coarse or cull timber, and it had not been approved of or culled; Thirdly, it had to be measured by the defendants before they could be required to accept it; and, Fourthly, it had to be measured by the plaintiff also, if he was dissatisfied with the defendants' measurement.

No question arose under the Chattel Mortgage Act, and we therefore do not consider it as influencing this case.

The legal property, we think, remained vested in Macdonald at the time when he made the agreement with the men on the 9th of April.

He could not have sued the defendants for goods sold and delivered, nor could the defendants have recovered the timber in an action of trover.

But it seems that the defendants had an equitable title to the timber by reason of their specific advances upon it.

The case of *Langton v. Waring*, (18 C. B. N. S. 315), shews this. And as the men took possession no doubt with sufficient notice of this fact, by reason of the timber being marked in the defendants' name, their claim in equity would be subservient to the defendants' rights. An equitable plea would probably not be admissible here, because a perpetual injunction would not be granted so long as the accounts between the defendants and Macdonald have not been fully taken and settled.

At law we think judgment must be for the plaintiff. The appeal therefore will be dismissed.

*Appeal dismissed.*

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#### MEMORANDA.

During this Term the following gentlemen were called to the Bar :—BERNARD DEVLIN, WILLIAM MCKAY WRIGHT, EDMUND JAMES BEATTY, JAMES O'LOAN, WILLIAM ROBERTSON CHAMBERLAIN, HENRY WILLIAM CHRISTIAN MEYER, JAMES EDWARD ROBERTSON, JOHN HENRY SCOTT, JAMES HERBERT TYLDESLEY BLEASDELL, FREDERICK BISCOE, JOHN WILLIAM DOUGLAS, JOHN MCLEAN, ALEXANDER DUNBAR, JAMES STRACHAN CARTWRIGHT, ALEXANDER JAMES CHRISTIE, THOMAS GREIG, JOHN WHITLEY, ALEXANDER DEVLIN, WILLIAM MALLOY, JOHN MUIR.

HILARY TERM, 32 VICTORIA, 1869.

*February 1st, to February 13th.*

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*Present :*

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

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NEVILLE V. FOX.

*Right to begin—Appeal—Costs.*

Replevin for a horse—Plea, that the horse was the horse of the defendant and not of the plaintiff as alleged, and issue thereon :

*Held*, that the plaintiff was entitled to begin.

The Judge of the County Court granted a new trial on the ground that he was wrong in allowing the plaintiff to begin, and that it had prejudiced the defendant, as the verdict for the plaintiff was against the weight of evidence. This Court held that though the verdict was wrong on the evidence the ruling was right, and an appeal was therefore dismissed *without costs*.

APPEAL from the County Court of Essex.

Replevin for a horse.

Plea—That the said horse was the horse of the defendant and not of the plaintiff, as alleged.

Replication, taking issue on the plea.

At the trial the defendant claimed the right to begin ; but the learned Judge ruled against him. The plaintiff therefore began, and evidence having been given on both sides, the jury found in his favor.

Afterwards a rule *nisi* was obtained for a non-suit, on leave reserved ; or for a new trial for irregularity in the proceedings, the plaintiff's counsel having been allowed to begin, whereas the issue was upon the defendant, and evidence of property having been admitted in reply ; and

because the verdict was against law and evidence and the Judge's charge, the goods having been proved to be the property of the plaintiff's son.

After argument in the court below the following judgment was given.

LEGGATT, J.—On consideration I think I was wrong in ruling at the trial that the plaintiff was bound to begin I found, on looking at the form of the plea in this case under the old style of pleading, that it concluded with a verification, in which case the plaintiff would have to reply, and the defendant would have to add the similiter; then, according to more than one rule by which the right to begin is determined, the defendant ought to have opened the case.

Then the next thing to consider is, whether the defendant was prejudiced by my ruling, and I am disposed to think he was, for in my opinion the weight of evidence was in his favour. I think there ought to be a new trial.

Rule absolute accordingly. Costs to abide event.

From this decision the plaintiff appealed.

*Harrison, Q. C.*, for the appellant. The learned Judge was right in his ruling at the trial as to the right to begin, and wrong therefore in his judgment. He might have granted a new trial on the weight of evidence alone, and in that case his discretion would not have been reviewed in appeal; but he did not do so. The new trial was not moved for in the court below on the weight of evidence, but on the law and evidence; and though in his judgment he says that the verdict was, in his opinion, against the weight of evidence, it is not on that ground he makes the rule absolute, but because he was wrong in his ruling; whereas he was right. It is uncertain whether he would have interfered with the verdict had he held that there was no error in the ruling; and unless his judgment therefore is right on the legal point it ought to be reversed.

*Robinson, Q. C.*, contra. The judgment was right. *Colstone v. Hiscolbs*, 1 Moo. & R. 301, is precisely in



point. That was an action of replevin for a horse. Plea, that the horse was the property of one S. H., and not of the plaintiff as in the declaration is supposed, with a conclusion by a verification. Replication, that the horse was not the property of the said S. H., but of the plaintiff. Conclusion to the country, and issue thereon. *Barstow*, for the plaintiff, contended that he was entitled to begin, the plea being a mere denial of an allegation in the declaration, namely, the property of the plaintiff, and therefore in the nature of a general issue. *Erle* and *Moody* for defendant, maintained that the affirmative proof lay on the defendant that the horse was the property of S. H.; and that, in order to defeat the action, it was not sufficient for defendant merely to disprove the property in the plaintiff. *Alderson*, J., after consulting *Patteson*, J., called upon the counsel for the defendant to begin. There is no substantial distinction between that case and the present; and the arguments on either side were urged.

The court held that the ruling was right at the trial: that the denial of the plaintiff's property was a substantial part of the plea, and traversed a material averment in the declaration, which the plaintiff must prove: that if no evidence were given, the plaintiff would therefore not be entitled to a verdict; and that as a consequence it was his right to begin. They agreed with the learned Judge below, however, in thinking that a verdict for the defendant would have been more satisfactory on the evidence, and on that ground they thought the judgment right. They dismissed the appeal therefore, but without costs, as the ground upon which the judgment proceeded was, in their opinion, wrong.

*Appeal dismissed.*

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## GRANT AND WIFE V. TAYLOR.

*Conveyance by married woman—Certificate of examination—1 W. IV. ch. 2.*

By 43 Geo. III. ch 5, and 59 Geo. III. ch. 3, a married woman's deed was declared to have no force unless she were examined by the Court of K. B., or a Judge thereof, or a Judge of Assize, touching her consent, &c., within twelve months from the execution. By 1 W. IV., ch. 2, sec. 3, it was enacted that where the deed would have been valid if such certificate had been obtained within twelve months as was required by the laws then in force, such certificate might be obtained at any time, and should have the same effect as if given within twelve months. This section took effect on the passing of the act in March, but another section, which enabled two justices of the peace, and other persons not mentioned in the former acts, to take such examinations, and made various changes in the form of certificate, did not come into force until the 1st of August following. A deed was executed in 1822 by a married woman and her husband, but no certificate was endorsed until 1836, and the certificate then given was signed by two justices, and sufficient in form under the earlier acts, though not under the 1 W. IV. There was no evidence of examination, &c., except the certificate:

*Held*, that the certificate was sufficient, for that the 3rd section of 1 W. IV. might be construed to mean such certificate as would in its terms have been sufficient under the previous acts, without requiring it to be given by the officers then authorized.

The certificate given in 1836 stated that the married woman appeared before the justices and "acknowledged that she executed the within deed freely and voluntarily, and it appeared to us that her execution thereof was not the effect of fear or coercion," &c.: *Held*, sufficient, without stating the fact of examination.

*Held*, also, that her acknowledgment in 1836 was evidence of her consent at that time to the deed taking effect, and not merely of her free execution in 1822; and that other objections, based upon the requirements of the later act as to the form of the certificate, were not available.

EJECTMENT for the west half of lot 10 in the 7th concession of Cartwright.

The cause was tried at the last fall Assizes at Cobourg, before Hagarty, J.

The land was granted by the Crown, in 1808, to Janet, wife of Duncan Bethune. She and her husband, on the 3rd of August, 1866, conveyed to the female plaintiff, her daughter, in fee. No consideration was proved to have been paid, but the consideration expressed in the deed was \$1,000.

This was the plaintiff's case.

The defence was that the patentee and her husband conveyed in 1822 to Alexander McKenzie. No certificate

was then endorsed on the deed; but a certificate was endorsed on the 29th August, 1836, and signed by two Justices of the Peace. McKenzie conveyed on the 30th January, 1840, to Henry Cæsar; and his heir-at-law, James Cæsar, conveyed, on the 30th June, 1854, and on the 11th March, 1856, to the defendant.

Henry Cæsar took possession in 1847, by cutting timber. He lived on an adjoining lot, and the possession had been continued since his death by James Cæsar and defendant. The land had been much improved, but there was no cultivation or clearing till 1854.

Several objections were taken at the trial as to the validity of the deed of 1822, in consequence of there having been no certificate when the deed was executed, and by reason of the alleged insufficiency of the certificate that was given in 1836.

The deed on which the question arose was dated on the 22nd of August, 1822, and was made by Duncan Bethune and Janet, his wife, the patentee, to Alexander McKenzie, for the consideration of £200. The land conveyed was 400 acres, being lot number 12, in the 25th concession of Manvers, and lot number 10 in the 7th concession of Cartwright; and the deed was registered on the 30th of January, 1824.

There was no evidence of any examination of the married woman having taken place, nor of her having made any acknowledgment before any person authorized to receive the same as to her willingness to part with her real estate, as required by the statutes then in force; and there was no certificate endorsed on the deed to this effect at the time the deed was executed, nor until long after, not until the 29th of August, 1836.

The certificate was as follows:—"We, the undersigned, two of Her Majesty's Justices of the Peace in and for the Eastern District, do hereby certify that Janet Bethune, wife of the within named Duncan Bethune, and late Janet Murchison, appeared before us at Williamstown, in the said district, and acknowledged that she executed the

within deed freely and voluntarily, and it appeared to us that her execution thereof was not the effect of fear or coercion on the part of her husband or any other person.

" Given under our hands at Williamstown, this 29th day of August, 1836.

(Signed) " RICHARD FRASER, J. P.

" " ALEXANDER McMARTIN, J. P."

A verdict was taken for defendant, with leave to the plaintiffs to move to enter it for them, if the court should be of opinion the objections or any of them were entitled to prevail.

*Kerr* obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs, pursuant to leave, on the ground that the deed from Duncan Bethune and wife to McKenzie was not valid, for the following amongst other reasons :

1. There was no evidence of the examination of Janet Bethune, as required by statute.

2. There was no evidence of her consent to convey her estate in the land at the time of the signing of the certificate endorsed on the deed.

3. The justices who signed and gave the certificate had no power to take an examination of Janet Bethune as to the deed, the power being in the Judge of Assize, or the Quarter Sessions, or the Chairman thereof, in open court.

4. There was no evidence that Janet Bethune executed the deed in presence of the justices, and that she was by them examined apart from her husband, and that she consented to alien and depart with her estate without coercion.

5. The certificate does not shew she consented to depart with her estate freely and voluntarily and without coercion at the time of the examination, but only that she declared she was willing at the time she executed the deed, and coercion at the time of the examination was what was intended to be guarded against.



6. The certificate is not dated on the day of her examination or within a year from the date of the deed.

7. The defect is not cured by any of the sections of the enabling statutes, because if it related back to the date of the deed the justices had no power in 1822, when the deed was executed, to take the examination.

8. It was not shewn the formalities which the statute required while in force had been complied with.

9. Under the 14th section of Consol. Stat. U. C., ch. 85, the title of the plaintiffs acquired subsequent to the said deed should not be prejudiced, and the deed or certificate should not be held valid to the prejudice of the plaintiffs' title.

10. The statute in force when the deed was executed was not repealed as to this deed by sections 3 and 5 of 1 Wm. IV. ch. 2, and the only persons who could legally have taken the examination were a Judge of Assize or a Chairman of the Quarter Sessions.

*Armour*, Q. C., and *C. S. Patterson* shewed cause. The certificate of 1836 was given under the 1 W. IV. ch 2, and, it is said, magistrates not having had power in 1822 to give certificates, they had no power to give the one of 1836 under the act of 1831. The third section of this Act enabled magistrates to give the certificate, though they had no power to give it in 1822. The statute makes no distinction between deeds executed before 1831 and those that were executed after, and they had power to give certificates beyond question when the deed was made after 1831. The act in force in 1822 was repealed by the Act of 1831.

The cases of *Jackson v. Robertson*, 4 C. P. 272, and *Allison v. Rednor*, 14 U. C. R. 459, shew that endorsing certificates upon the deed given before the act of 1831 was not necessary, the provisions as to it being only directory. The married woman appears here to have executed the deed before the magistrates at the time the certificate was given, and therefore the certificate is clearly sufficient, as operating on a deed then executed, and not on one pre-

viously executed. *Stayner v. Applegate*, 8 C. P. 133, 457, and in appeal, is a decision that the omission of the words from the certificate "apart from her husband" avoided the certificate, and Consol. Stat. U. C. ch. 85, was passed to cure such defects in certificates; see sections 10, 11, 12, 13. It was not necessary the husband should re-execute in 1836, for it was a deed executed by him jointly with his wife, because it was their joint deed: *Burns v. McAdam*, 24 U. C. R. 448. Everything should be presumed to have been and to be rightly done: *Orser v. Vernon*, 14 C. P. 573; *Monk v. Farlinger*, 17 C. P. 41; *Commercial Bank v. Smith*, 18 C. P. 214. The covenants of the deed are in force, although the conveyance may be void; *Doe Wilson v. Wessels*, 5 O. S. 282; and if so the grantors are estopped from disputing it, and the plaintiffs also who claim from them: *Doe Dibble v. Ten Eyck*, 7 U. C. R. 600; *Arnold v. Butler*, 15 U. C. R. 255. Possession has gone with this deed, and everything will be presumed in favor of possession: *Tiffany v. McCumber*, 13 U. C. R. 159. If the court are against defendant as the case now stands, there should be a new trial to establish more clearly the execution by the wife in 1836 of the deed, and to prove title out of the plaintiffs by reason of a prior deed having been executed by their grantors to Mr. Proudfoot, which fact can be made to appear by affidavit, which will be produced if the court will receive it.

The certificate should be sufficient if the woman were examined in a way sufficient in a case of dower; 43 Geo. III. ch. 5; 2 Geo. IV. ch. 15; 1 Wm. IV. ch. 2; Consol. Stat. U. C. ch. 84, and ch. 85. The act of 1831 misstates the law. The certificate under the previous statutes was not essential to the validity of the deed; it was the examination of the woman; the certificate was only directory. *Morgan v. Sabourin*, 27 U. C. R. 230.

*Robinson*, Q.C., and *Kerr* supported the rule. The Consol. Stat. U. C. ch. 85, cannot be relied on, for the certificate given was not one as if relating to dower. There is no room for presumption, because all the facts appear. If

the certificate of 1836 is to have relation to the statutes which were in force before 1831, magistrates had no power to take the examination ; and if it is to be considered as granted under the act of 1831, it does not conform to the requirements of that statute. In *Stayner v. Applegate* the certificate was held defective although an examination had in fact taken place. As to the supposed re-execution by the married woman in 1836, the husband's execution was void in 1822, and the wife could not make it valid against him in 1836 by her re-acknowledgement. He never confirmed it. It was not therefore a deed executed by the wife jointly with her husband; but there was no evidence of a re-execution by the wife. If the deed were void there could be no estoppel.

The certificate should shew the woman knew distinctly she was parting with her real estate; but this does not appear. No person but those who were authorized before the act of 1831 to grant certificates, were authorized by that act to grant them after it was passed for or upon such deeds as had been executed before that act. The act was passed in March, 1831; the section giving magistrates power to grant certificates was not to take effect till August after. In that interim justices clearly could not give certificates. Then why should they grant them after August any more than before August in respect of past transactions that had taken place before the passing of the Act? *Re Wickson*, 4 C. B. 631; *Re Dallas*, 10 C. B. N. S. 346; *Allan v. Levisconte*, 15 U. C. R. 10.

ADAM WILSON, J., delivered the judgment of the court.

By the 43 Geo. III. ch. 5, it is quite clear the deed by a married woman of her own land was of no force unless she was examined by the Court of King's Bench, or a Judge of the Court in Chambers, or a Judge of Assize, touching her consent, and unless she freely gave her consent to depart with her real estate, and unless such examination took place within six months from the time of the execution of the deed which she had made jointly with

her husband. Upon this being done, and it appearing to the Court or Judge that the woman gave her consent freely, the Court or Judge was to cause a certificate thereof to be endorsed on the deed.

The 59 Geo. III. ch. 3 made no difference in the preceding act, so far as this case is concerned, excepting that it extended the time for the examination of married women and the giving of certificates to twelve months from the execution of the deed.

In *Allison v. Rednor* (13 U. C. R. 459) and *Jackson v. Robertson* (4 C. P. 272), it was the opinion of the court that the clause as to giving a certificate and as to what it should contain was directory only. The other cases also which permit evidence to be given de hors the certificate, establish the same doctrine.

At the time this deed of 1822. was given it was not absolutely void, for the deed could have been perfected at any time within twelve months from its execution, by the married woman appearing before the proper authority and undergoing the examination, and making the acknowledgment required by law. This, however, was not done, and by reason thereof the deed, in the language of 59 Geo. III., had "no force or effect to bar her or her husband or her heirs during her coverture, or after its dissolution, or any force or effect whatever," after the expiration of the twelve months, until the passing of the 1 Wm. IV. ch. 2.

By that statute the deed was not deemed to be absolutely void, for it enabled the certificate to be still given, the effect of which would have been to have made it as binding as if the certificate had been duly given under the prior act.

The purchaser from the expiry of the twelve months under the 43 Geo. III. until the passing of the 1 Wm. IV. ch. 2, had no claim to the land nor remedy for it, but after the passing of the last mentioned act his title was revived to some extent. The 3rd section of that act provided, "that in all cases in which a married woman shall, before the passing of this act, have made any conveyance which would



be valid in law if such certificate had been obtained within the period of twelve months, as was required by the laws then in force in this Province, such certificate may at any time after the passing of this act be obtained, notwithstanding the period of twelve months may have expired, and the same shall have the like effect, and no other, as if given within twelve months: Provided always, nevertheless, that nothing herein contained shall affect, or be construed to affect the right to lands of any person or persons who may have obtained a deed according to law for any lands which may have been previously conveyed by a married woman, but not acknowledged before a Judge pursuant to the laws of this Province."

This section took effect immediately after the passing of that act, although the first and second sections *did not until the first of August thereafter*. The first section provided for deeds executed in the Province, and the second section for deeds executed out of the Province.

The first section enabled Judges of the District Court and of the Surrogate Court, and two Justices of the Peace, as well as Judges of the King's Bench, to make such examinations and to grant certificates.

This act was passed in March, so that between that time and the first of August all deeds acknowledged and certificates given had to be acknowledged and given before and by the Court of King's Bench, or a Judge of that Court, or a Judge of Assize, as provided by the 43 Geo. III. ch. 5; but after the first of August that act was repealed, "except as to any conveyances which have been or shall be executed while the same was in force," and all acknowledgments had then to be made before and certificates to be given by the persons authorized by the repealing act of 1831.

The plaintiffs contend that as the 43 Geo. III. was not repealed altogether, but was continued in force as to all conveyances which had been or should be executed while the same was in force, that is, until the first of August, 1831, and as the deed in question was executed while that act was in force, that the acknowledgment should have been

made under it—that is, should have been made before a Judge of the King's Bench, and not before two Justices of the Peace, who had no power, it was said, to take acknowledgments of such deeds.

And they contended also, that as it is quite clear Justices of the Peace could not act between the passing of the act and the first of August, and as deeds executed before the act of 1831, could by this act immediately after it was passed have the acknowledgment taken, they must of necessity have been made before the court or a Judge of the King's Bench under the act of 1803, and not before Justices of the Peace, under the act of 1831; and that this being quite clear as to the period between March and August, it maintained and corroborated the argument as to the time after the first of August, inasmuch as the old act was expressly continued and made applicable to all deeds executed up to that day, at which time the act of 1803 was to be determined.

This may be conceded to be quite correct as to the time between March and August, simply because in that interval there was no other authority to take the acknowledgment than that which had been created by the act of 1803.

But it is not so obvious that the same rule is to be applied after the first of August to deeds made before the passing of the Act of 1831.

No doubt a deed made before March, 1831, could, after the first of August, have been acknowledged under the act of 1803, for the act was not repealed as to such conveyances.

It does not seem, however, that the act was continued for the mere purpose of enabling certificates to be granted under it. It was continued rather from excessive caution, to maintain all conveyances which had been executed under it, even although they had been completely perfected before the act of 1831.

It may be said that the third section of the act of 1831 shewed that the certificates under it were to be granted only by those who had the power to grant them under the

act of 1803: that the words, "if *such* certificate had been obtained within the period of twelve months as was required by the laws *then* in force, such certificate may at any time after the passing of this act be obtained," shewed that *such* certificate meant only such a certificate as was grantable and could have been granted under the act of 1803; that is, by the Court of King's Bench, or by a Judge thereof, but not by justices of the peace.

It certainly does mean that no more particularity or formality than that act required should be necessary in those certificates which were given after the act of 1831, than had been required before. Does it mean more than this? Does it mean that the certificate given after the passing of the act of 1831, and after the first of August of that year, must also be given by the same person who was empowered to give it before that act? If it do, the defendant's title must be defective. We confess we entertain very great doubt how to construe this section.

It is clear that after the passing of the act until the first of August justices of the peace could not act, and it seems clear that after the passing of the act until the first of August, and after it as well, the certificate could have been given under the act of 1803. The language too that "such certificate may at any time after the passing of this act be obtained," applying to the certificate which was required by the laws *then in force*, that is, at the time when the conveyance was made in 1822, all tend to the conclusion that the certificate which was obtained in 1836 should have been such a certificate as could have been granted in the year 1822.

We are not prepared, however, to adopt this conclusion. The statute of 1831 enabled many new persons to take the acknowledgments of married women, and to *grant certificates*, who had not been authorized to do so before, and it altered the nature of the certificate in many important respects from what it had formerly been. It made it an essential part of the validity of the deed (1) that the certificate should be on the back of the deed, and (2) should be put

there on the day of the execution of the deed, and not at any time within twelve months thereafter, as under the former law; (3) that it should state the place at which the married woman appeared to make the acknowledgment; and (4) that it should state she was examined apart from her husband—none of which matters were absolutely required or mandatory before.

Now the third section may be construed consistently with these new provisions, and with the phraseology of the section itself, by reading "such certificate as was required by the laws then in force" to mean such certificate as would in its terms have been sufficient under the former law, without the new additions and qualifications made to it by the new law.

By construing it in this manner the certificate will be the same which was required by the laws then in force, although it may not have been given by the same class of persons as those who formerly gave it.

We do not perceive any purpose the legislature could have had in view by requiring the certificate to be obtained many years after the execution of the deed from the same class of persons who could have given it when it should have been got.

If the statute had expressly declared that the Court of King's Bench or a Judge thereof could alone grant it, the direct language of the act must have been observed; or if it had declared that the same persons before whom the acknowledgment should have been made if it had originally been made in time, should be the only persons to take the newly authorized acknowledgment, the statute also must have been followed; but there is no reason apparent why one class of persons more than another of all those declared eligible to act should be preferred for such a purpose.

We think the act is capable of being so construed, and it is beneficial to give it this meaning, to make effectual a transaction which need not have been revived at all if the married woman had not desired to establish the deed which she herself signed and received full value for. It



was but an act of honesty, although she was doing more than she could have been compelled to do.

What she did then in 1836 by way of confirmation of her deed made in 1822, should be maintained, if possible, against her later act of 1866, when she made the voluntary deed to her daughter to defraud the person to whom she honestly sold more than forty years before, and who had sold to others trusting to the title which she gave, and who have improved the land believing it to have been their own.

It was also argued that there was no evidence of the examination of Janet Bethune as required by the statute.

The statute of 43 Geo. III. and 59 Geo. III., which are alike in this respect, provided that the deed should have no effect unless the married woman appeared before the Judge or other person under the 43 Geo. III., "and be examined by the said Court or Judge touching her consent, and shall freely and voluntarily, and without coercion, give her consent before such Court or Judge to alien and depart with such estate." And further, "that in case it shall appear to the said Court or Judge that such married woman doth fully and freely consent to depart with, alien and convey her said real estate without coercion or fear of coercion on the part of her husband, or any other person, it shall be lawful for such Court or Judge, and they are respectively hereby required to cause a certificate thereof to be endorsed on the deed so executed by her and her said husband as aforesaid, which certificate shall state the day on which such examination is taken, and shall be signed by the Chief Justice," &c.

The certificate it will be seen was not required to state the fact of examination, but the result of the examination only, namely, that it appeared the married woman did freely consent, &c., and this certificate is conformable to the statute in that respect.

It must be assumed therefore that the preliminary examination had been duly made, which enabled the magistrate to state the result of it in this authorized and official form.

It was then said, which was the second objection in the rule, there was no evidence of her consent to convey her estate in the land at the time of the signing of the certificate.

The statute does not require more than that she should give her consent to depart with her estate, and that the certificate should state that it appeared to the person taking the examination that it appeared to him she did freely consent to do so.

This certificate states "she acknowledged that she executed the within deed freely," and it is said this means only that, she acknowledged in 1836 that she executed it in 1822 freely, but not that she did so in 1836. It may very well be assumed that her appearance in 1836 was a voluntary appearance, and that, as she was doing an act then which the law did not oblige her to do, that her acknowledgment in 1836 was evidence of her full and free consent at that time to the deed taking effect.

This will answer the fifth objection also.

It was not necessary that Janet Bethune should have executed the deed in presence of the Justices, nor that she should have been examined by them apart from her husband, for this deed was governed by the acts prior to 1831, in which none of these requirements are to be found.

It was next objected that there was no evidence she consented to depart with her estate without coercion. The acknowledgment that she executed the deed freely is evidence of consent to depart with her estate without coercion.

The objection that the certificate is not dated on the day of her examination is not an objection, for the statute did not require it.

The other objections taken are either not sustainable or they have been answered already.

We think, on the whole, though not without great doubt, the rule should be discharged.

*Rule Discharged.*

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## CASWELL V. THE ST. MARY'S AND PROOF LINE JUNCTION ROAD COMPANY.

*Road Company—Snow drifts—Action for not repairing.*

A snow drift, about two or three rods long and two feet in depth, had formed on a gravel road. It had been there two or three weeks, and owing to the thawing and freezing of the snow, ruts had formed in it, which made it unsafe for waggons. On the 1st of March the plaintiff was passing over it in a waggon, when the wheel going down threw him out and the hind wheel went over his leg and broke it. The defendants afterwards cleared away the snow there. The road was good except for the snow, and there was a heavy snow storm and sleighing after the accident :

*Held*, that there was evidence of negligence on the part of the defendants in not keeping the road in repair, and a verdict for the plaintiff was upheld.

ACTION for not repairing a road, and for wrongfully suffering it to be out of repair, occasioned by accumulation of snow, and by there being dangerous ruts in the road, by reason whereof the plaintiff, while driving in his carriage or waggon, was violently thrown from the carriage and had his leg broken, and was otherwise wounded and injured, whereby, &c.

*Plea—Not guilty.*

The case was tried at the last spring assizes at Stratford, before Hagarty, J.

The evidence shewed that on the 1st March, 1867, the plaintiff and his wife were riding in a waggon, being driven by one James Matches, whom the plaintiff had hired to carry a grist for him. According to Matches' statement, the road was pretty good till near a place called Prospect Hill, where the plaintiff got out of the waggon, and got in again when it was better. The snow was hard in places, soft in others. The wheel went down in one spot and threw the plaintiff out, and the hind wheel went over his leg and broke it. This was about five rods from one Cherrick's tavern.

There were two or three rods of this bad piece, with holes; no waggon could pass another there; the holes were caused by the hard and soft snow, which was about two feet deep; the sleighing, he said, had been over for some

time. The road under the snow was gravel; it was the snow that made it bad. Matches said he saw one man with a sleigh that day, but he had hard work with it; the road was completed and tolls collected, and no part abandoned; it was dangerous as it then was. But for that bad place the accident would not have happened; it was a pretty good piece of road but for the snow. Matches paid tolls on the road that day. The waggon did not upset. There had been a snow-drift in that place, and there were about two bad drifts in ten miles of the road they passed that day, and snow in different places; the holes were in the snow before the waggon came; one waggon did not make them.

*Andrew Rae* said: The piece of road where the accident happened was in a bad state; the snow-drifts and thaw caused it; it was very good otherwise; it was dangerous to any one not aware of the ruts, which an ordinary person would not notice; there was passable but not good sleighing, in some places no snow at all; the wheeling was better than the sleighing then; there was a heavy snow storm and sleighing after that. After the accident the toll-keeper got the place cleared and made level by throwing off the snow and ice; at that spot it was dangerous if one did not know the danger; one could see the ruts but not their depth; they were waggon-ruts, about two feet of snow in the rut; there had been a thaw and then a frost; the road had been bad for some time, can't say for how many days.

*Benjamin Stanley* said: The snow-drifts had been there for two or three weeks; the road was not then safe; but for the snow it would have been all right; the drift was across the road; did not know if defendants knew of the state of the road; the drift had caused travellers to leave the centre of the road and go over to the side; a sleigh could not get through the centre of the road with an ordinary load.

*John McLaughlan* said: There was an old drift of snow; the waggon made the ruts, and thawing and freezing made the road dangerous; the road was very good but for the snow.



At the end of the plaintiff's case defendants' counsel moved for a non-suit, because the gravel road was good, and any danger in travelling was occasioned wholly by the snow, which defendants were not bound to clear away; referring to *Stewart v. The Woodstock and Huron Plank and Gravel Road Company*, 15 U. C. R. 427.

The learned Judge reserved leave to defendants to move to enter a non-suit, as his opinion was strongly against the plaintiff's right to maintain an action.

The defendants' witnesses added nothing, except that they thought the road was better for sleighs than waggons. One witness said he did not consider the road safe for either a waggon or sleigh with a load, in consequence of the thawing and breaking-up of the road.

The learned Judge directed the jury to say whether it was proved to their satisfaction that in consequence of defendants' neglect to keep the road in reasonable repair the plaintiff was injured, taking into consideration the climate, time of year, the falling and lying of snow, and the action of thawing and freezing. He remarked that the road was in good repair, apart from snow, and that some fell after that, which made good sleighing: that his opinion was that leaving snow on the road, at least during the ordinary winter season before the time for snow storms and sleighing had elapsed, was not a neglect to repair; but as the defendants had leave to move on that point he did not direct them absolutely as to it. He left it to them to say on the evidence whether there was negligence or not.

The jury found for the plaintiff and \$75 damages.

In Easter Term last *Robinson Q.C.*, obtained a rule calling on the plaintiff to shew cause why a non-suit should not be entered pursuant to leave reserved, on the ground already mentioned; or why a new trial should not be granted, the verdict being contrary to law and evidence, in this, that there was no sufficient evidence of the neglect or breach of duty charged against the defendants.

In this Term *Ferguson* shewed cause (*a*). The question is whether the defendants, under Consol. Stat. U. C. ch. 49, section 84, and by common law, are bound to keep the road in repair and free from ice and snow, if it be dangerous to travellers, in the winter season. The defendants charged toll, and should therefore have repaired. *Stewart v. The Woodstock Plank Road Co.*, 15 U. C. R. 427, does not apply, for that was an action by the lessee of the company's tolls against the company for not removing snow from the road, and so for not keeping it in repair; but the company had never engaged to keep the road in repair in the lease they made to their lessee.

*Robinson, Q. C.*, contra: The case just mentioned is substantially a decision on the point, but it is not necessary to go so far as that case would warrant, for here no negligence was shewn at all. Even admitting that under certain circumstances it might be defendants' duty to remove snow from the road, it certainly could not be so here, for the winter was not over, there were snow storms and good sleighing afterwards, and at the time of the accident it was doubtful whether the road was better for waggons or sleighs: *Angell on Highways*, 264, 266; *Glen on Highways*, 77; *City of Providence v. Clapp*, 17 Howard, 167.

ADAM WILSON, J., delivered the judgment of the court.

The statute provides that after any road has been completed and tolls established thereon, the company shall keep the same in repair.

The road is said to have been out of repair, by reason of the snow for a distance of two or three rods being hard in some parts and soft in others. The snow was about two feet in depth where there had been a drift. The holes or ruts in the snow had been caused by the waggon-wheels breaking through the snow during the thaws, and the thawing and freezing had made the road dangerous. The snow-drift had been lying there for two or three weeks;

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(*a*) This case was argued also in Easter Term, but a re-argument was directed in consequence of the changes in the Bench.

the drift was across the road, and had caused travellers to leave the centre of the road and go over to the side. The wheel of the plaintiff's waggon went down in one spot, which threw the plaintiff out, and the hind wheel of the waggon went over the plaintiff's leg and broke it. The evidence shews that but for the bad place where the accident happened it would not have happened, and also that the road at that place was dangerous, and that after the accident the defendants got the place cleared and made level by throwing off the snow and ice.

It is by no means an easy matter to lay down any general rule on the subject, but it is clear that the company cannot be required to clear the snow off the ground whenever it falls, or even to remove the ice which may form there. It would frequently be an impossible work to attempt it, and it would be mischievous and a nuisance in some cases to effect it. Snow is looked for in this country and provided for as forming the best and most suitable means of travelling during the winter, and even when it falls to a great and unusual depth it is not the duty of any person or body of persons to remove it from the roads. Those who use them at such a time must use them as best they can while this natural and unavoidable impediment lasts.

Nor can any one be required to remove the mud and mire from the road, caused by rain or by melting of the snow, for this, too, is an obstruction caused by a usual natural process.

There are, however, cases where snow, and ice, and mud, may and must be removed from the road.

If a particular part of it for two or three rods in length happens to be in a very dangerous condition, exceptionally and particularly dangerous as distinct from the rest of the road, and it can be put in a safe state and at a reasonable expense, there is no reason why it should not be made safe for travel, although it was caused by rain, snow, or ice, or what may be called natural means.

No doubt, if a low part of a road in the form of a basin be filled by flowing water or by rain, it must not be allowed

to remain in that condition, if dangerous to travellers, until it is dried up in course of time, if by reasonable means the cause of danger can be removed. Or if snow collects at a spot, and by the thawing and freezing the travel upon it become specially dangerous, and if this special difficulty can be conveniently corrected by removing the snow and ice, or by other reasonable means, there must be the duty on the person or body on whom the care of reparation rests to make such place fit and safe for travel.

So if at a narrow and perilous part of the road, passing along the edge of a ravine, a flow of water, caused by the melting of the snow, ran across the road and formed a sheet of ice slanting to the brow of the hill, so that vehicles in passing swung or fell round towards the ravine and were in danger of being thrown over the bank, and if this danger could be averted by some reasonable means, there would certainly be an obligation on the persons bound to repair the road to make the repair necessary for the purpose; and if they failed to do so, and an accident happened by reason of their default, they would be answerable for the consequences.

The season of the year can make no difference in cases of this kind, cases of a special and exceptional nature. Natural difficulties and impediments must be removed at all seasons of the year if they can be conveniently and reasonably removed, and if their removal is absolutely required for the safety of life and property.

The case of *Stewart v. The Woodstock, &c., Road Co.* (15 U. C. R. 427), does not disclose the facts on which the decision was pronounced. The statement that "Letting snow lie on a macadamized road does not, in our opinion, come under the notion of suffering the road to go out of repair," as a general proposition is no doubt correct. No peculiar impediment, danger or nuisance appears to have existed, and therefore the Chief Justice said interrogatively: "How many miles must they keep clear; all the line of road by which travellers are in the habit of approaching the gate; or, if not, what portion of it, and by what principle should



we limit the number of miles in any direction that they are bound to keep clear?"

The court did not mean to lay down the rule that because a particular part of a road had become specially dangerous by snow, there was no obligation on the persons charged with the repair of the road to remove the same and render it safe.

Where part of the road had been completely carried away by the sea, and it could not be made good without considerable engineering works, it was held the parish was not bound to execute the repairs, and that they were not bound to guard against the encroachment of the sea. And Maule, J., said: "There is no such thing as an absolute right against the act of God and the processes of nature." *Regina v. The Inhabitants of Hornsea* (25 Law and Eq. Rep. 582.)

In *Regina v. Bamber* (5 Q. B. 279), Lord Denman, C. J., said: "I do not rely much upon the argument that the ancient line of highway has been removed. But here all the materials of which a road could be made have been swept away by the act of God. Under these circumstances can the defendant be liable for not repairing the road? We want an authority for such a proposition, and none has been found."

In *The Queen v. The Inhabitants of Stretford* (Ld. Raym. 1169), a highway was alleged to be *valde lutosa*, and it was argued that it was no offence for a highway to be dirty in winter.

The rule must be as expressed by Maule, J., above quoted, that there is no such thing as an *absolute* right against the act of God and the processes of nature. He does not say that there is *no* right of repair in such a case, but he qualifies it materially and necessarily, as it must be, for who could be required to remove miles of snow in length and several feet in depth from off a highway, or a land-slide of the same nature, caused by some process of nature, or a like extent which had been washed away by some extraordinary flood or violence of the water?

But if obstructions of any kind were made by human means the right of removal would be absolute, for there would be blame in law, and therefore responsibility against the wrong doer.

As there is no absolute right against the defendants there can be no absolute exemption in respect of such obstructions, hindrances and accumulations as the plaintiff has complained of: *Parnaby v. Lancaster Canal Company* (11 A. & E. 223); *Mersey Docks Trustees v. Gibbs* (11 H. L. 686.)

It must be a question of fact altogether for the jury to say whether the place alleged to have been out of order was dangerous, and if so from what cause, and if from a natural cause or process whether the persons liable to repair the road could reasonably and conveniently, as regarded expenditure and labor, have made it safe for use.

If the obstruction or danger could properly and reasonably have been removed, then the persons on whom the burden lay to keep the road in order should be held to the fulfilment of their duty to make it safe and useful for the public, at whatever season of the year or from whatever cause the impediment or difficulty may have happened.

The facts here are, that for a distance of two or three rods the snow from a drift was on the 1st of March about two feet in depth: that it had thawed and frozen, and by the action of waggons had been cut into ruts and holes so as to be dangerous: that the drift had been lying there two or three weeks; and that it could easily have been removed before, as it was in fact removed after the plaintiff was injured.

The learned Judge left the case fully and fairly to the jury, and they found there was negligence on the part of the defendants in suffering this small part of the road to remain in this dangerous condition.

Upon the facts they could scarcely have found otherwise, and as we are not aware of any rule which prevents a recovery in law, we think the verdict must stand.

*Rule discharged (a).*

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(a) The defendants have appealed.

FRASER *qui tam* v. MCKENZIE.*Justice of the Peace—Qualification.*

Consol. Stat. C. ch. 100, sec. 3, prescribing the qualification of Justices of the Peace, does not require them to have a legal estate in the property; it is sufficient if the land, though mortgaged in fee, exceeds by \$1200 the amount of the mortgage money.

THIS was an action brought to recover from the defendant, who was in the commission of the peace, several penalties under Con. Stat C. ch. 100, for acting as a justice of the peace and not having the required amount of property qualification.

The case was tried before Adam Wilson, J., at Lindsay, at the last Spring Assizes.

It appeared at the trial that the defendant on several occasions, seven in all, had acted as a justice of the peace: that he was the owner of certain lands, which were encumbered by mortgages; and it was contended that whether the defendant had real estate in value sufficient over and above the incumbrances or not, the fact that it was mortgaged appearing, he could not act as a justice of the peace without incurring the penalty.

After a good deal of evidence had been given, the question of fact left to the jury was, the value of the lands to which the defendant proved title. The jury found the value to be \$3100, with mortgages to the amount of \$1800, leaving a value over and above the incumbrances of \$1300.

A verdict was entered for the defendant, with leave to the plaintiff to move to enter a verdict for him for \$700 on the legal question raised.

During last Easter term *J. A. Boyd* obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, pursuant to the leave, save as to the second and fifth counts; and why a verdict should not be entered for the plaintiff for \$700 on the other counts, on the grounds, among others, that the defendant did not prove himself duly qualified within the meaning of the statute,

and that the real estate upon which he qualified was mortgaged in fee.

During this term *Hector Cameron* shewed cause, citing *Leith's Blackstone*, p. 50.

*Boyd*, in support of the rule, cited 18 Geo. II. ch. 20, Imperial Act; *Chitty's Stats.* vol. ii. p. 944; *Reg. ex rel. Blakeley v. Canavan* 1 U. C. L. J. N. S. 188; *Wright v. Horton*, Holt N. P. C. 458; *Anelay v. Lewis*, 17 C. B. 327.

MORRISON, J., delivered the judgment of the Court.

The question on this rule for our determination is whether the defendant is liable under the 6th section of chapter 100, Consol. Stat. C. That section enacts that any person who acts as justice of the peace, &c., without having taken and subscribed the oath prescribed, or without being qualified according to the true intent and meaning of this act, shall for every such offence forfeit the sum of \$100, &c. The third section provides, "No person shall be a justice of the peace, or act as such, \* \* who has not in his actual possession, to and for his own proper use and benefit, a real estate either in free and common socage, \* \* or lease for one or more lives, or originally created for a term not less than 21 years, \* \* in lands, tenements, or other immovable property, \* \* of or above the value of \$1200, over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents and charges payable out of or affecting the same, or who before he takes upon himself to act as a justice of the peace does not take and subscribe the oath following," &c.

The oath is: "I — swear that I truly and *bonâ fide* have to and for my own proper use and benefit such an estate (specifying the same, &c.) as doth qualify me to act as a justice of the peace according to the true intent and meaning of the act," &c.

It was broadly argued by the plaintiff's counsel that if the real estate upon which the defendant qualified was mortgaged in fee, no matter if the lands were worth \$10,000, if they were so encumbered to the extent of \$1, that the



defendant in that case incurred the penalties ; for it was contended that the statute limited and required in the defendant's case that he should hold the real estate in free and common socage: that he could not qualify upon such an estate—such as he proved in this case, and the jury found he had. No authority was cited to us, but we were referred to the English act of 18 Geo. II. ch. 20, from which statute apparently the provisions of our act were taken, and it was argued that as our statute did not follow the terms of 18 Geo. II. as to the kind of estates, it indicated the intention of the Legislature to restrict the qualification to legal estates.

The words in the English act are, who shall not have an estate of freehold or copyhold to and for his own use, &c., in possession for life, &c., *either in law or equity*, &c., or for a certain term originally created for 21 years or more, &c., of the clear yearly value of £100, over and above what will satisfy and discharge all incumbrances, &c.

The words “either in law or equity,” are not inserted in our statute. If they were omitted by the framers with the view of prohibiting justices from acting as such without being seized of a legal estate only, they have used and added language quite inconsistent with such an intention, for the use of the words “over and above what will satisfy and discharge all incumbrances,” manifestly indicates that the Legislature had in view encumbered real estate, and it is therefore more likely and more reasonable to assume that the words “in law or equity,” were omitted inadvertently, or because they were deemed unnecessary. But however that may be, our duty is to give to the words of the statute, in the language of the Interpretation Act, “such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the act, and of such provision or enactment, according to their true intent, meaning and spirit”—Consol. Stat. C., ch. 5, sec. 6, sub-sec. 28. In construing statutes the general rule is, where the words are plain we are to decide on them; if they are doubtful, we are then to have recourse to the subject-

matter, and to give to the language such a construction as will be consistent with the object of the act, and fulfil the intentions of the Legislature. Now the object of the statute was to provide for and insure that persons appointed to the commission of the peace, before acting should be interested in real estate to the extent in value of \$1200; and upon reading the third section the combined effect of the language used, as well as that of the ninth section, evidently shews that the Legislature meant that if the justice was the owner of real estate in his actual possession, and which he took by conveyance or otherwise in free and common socage, (that tenure by the Imperial Act 31 Geo. III., ch. 31, sec. 43, being the only tenure by which lands could be granted by the Crown in Upper Canada), of the value of \$1200 over and above what would satisfy all incumbrances on it, he would in that respect be qualified. What the Legislature had in view was the having an interest in land in his actual possession to the value of \$1200. A legal estate in fee was not essential, for we see that the section provides for holding the lands under a lease, providing that it was one made originally for 21 years and upwards; so on the whole we think that if a justice, as in the case of the defendant, had property conveyed to him in fee in his actual possession, but had mortgaged or otherwise incumbered it, he would nevertheless have a sufficient property qualification, provided the land was worth \$1200 over and above what would satisfy all incumbrances. By giving such a construction to the statute we are not doing any thing repugnant to it; we are only reading the language of the third section according to its ordinary familiar signification and import. Neither does it conflict with the form of oath prescribed by the section, or with the provisions of the sixth section, under which this action is brought. No man incurs a penalty unless the act which subjects him to it is both within the spirit and letter of the statute imposing the penalty.

We are therefore of opinion that the rule should be discharged.

*Rule discharged.*

## THE QUEEN V. CAMPION.

*Tolls—Illegal demand of—Conviction for—Exemption.*

Consol. Stat. U. C. ch. 49, sec. 89, which makes it an offence to "take a greater toll than is authorised by law," does not apply to the case of taking toll from a person who is altogether exempt.

If it did, a conviction for such offence should state the ground of exemption, and the fact of such exemption being claimed.

In this case the defendant passed through the gate on the 10th January, the collector giving him credit, as was usual between them. On the 20th they had a settlement, and this toll was then demanded and paid. *Semble*, that a conviction for such demand, if illegal, could not be supported.

DURING last Easter Term, *Robinson, Q. C.*, obtained a rule *nisi* calling on one McDonough, the complainant, Christopher Crabb, the convicting justice, and Secker Brough, Esq., chairman of the Court of General Quarter Sessions of the Peace for the County of Huron, and two other justices, his associates, to shew cause why a conviction made before the convicting justice, on the 23rd January, 1868, and affirmed as amended by the Court of Quarter Sessions, and the order of sessions confirming it, should not be quashed, upon the grounds, among others, that the conviction discloses no offence, the complainant, as appears on the face of the conviction, being wholly exempt from toll: that the toll was taken on the 20th for passing the gate on the 10th January: that it does not appear on what ground the complainant was exempt, or that he claimed to be exempt, or how much more than the authorized toll was demanded and taken, or that the complainant claimed such exemption on paying the said toll or on passing through the gate.

The rule was drawn up on reading the writ of *certiorari* issued in the matter, the return thereto, the conviction, the order confirming the conviction as amended, and the other papers and affidavits returned with the *certiorari*, and those filed upon the application for the *certiorari*.

The conviction returned was as follows: Be it remembered, &c., David Campion is convicted before, &c., for that he, the said David Campion, *being a collector of*

*tolls at a toll gate upon the northern gravel road, did on the 20th day of January last, in the township of Colborne, in the County of Huron, demand and take as such collector from one James McDonogh, twelve and one-half cents, being a greater toll than he was authorized by law to claim, by reason of the said James McDonogh being exempt from the payment of any toll at said gate for passing on the tenth instant through the said gate, being the gate known as "Smith's Hill toll gate"; and the conviction proceeded to adjudge the said Campion for his said offence to forfeit and pay the sum of \$20, &c., and \$3.75 costs, and if not paid forthwith to be levied by distress, and in default of distress to be imprisoned for the space of twenty days.*

The conviction was appealed against, and the appeal heard at the following sessions, when the conviction was by order of the session amended and confirmed, with \$10 costs. The amendments made are shewn by the words in italics, which were ordered by the sessions to be inserted.

During this term *J. B. Read* shewed cause, referring to Con. Stat. U. C. ch. 49, sec. 89; and *Robinson*, Q. C., supported the rule, citing 4 Geo. IV. ch. 95 sec. 30 (Imperial Act); *Oke's Turnpike Acts*, pp. 454, 458, 371-3; *Regina v. Dawes*, 22 U. C. R. 333

MORRISON, J. delivered the judgment of the court.

This conviction is assumed to be made under the 89th sec. of Consol. Stat. U. C., ch. 49, which enacts, "if any person being either the renter or collector of tolls at any gate on any road, takes a greater toll than is authorized by law, he shall for every such offence forfeit and pay the sum of \$20, to be recovered in the same manner as other penalties imposed by this act"; and the main objection is, that the conviction does not disclose any offence within the meaning of that section.

It is quite clear that the offence created and contemplated by the statute is the exacting and taking a sum over and above the amount of toll which the collector is



authorized to take. If the Legislature intended to include as an offence the taking of toll from a person who was exempt from the payment of toll, and who claimed the exemption, it is only reasonable to suppose it would have done so in express terms, as enacted by the English act to which we were referred, 4 Geo. IV. ch. 95, sec. 30, which act makes it, in addition to an overcharge, an offence to take toll from any person exempt and who claims the exemption.

As suggested by Mr. Robinson on the argument, we can see a good reason for imposing a penalty in a case where the collector has a full knowledge of his duty and wilfully and extortionately exacts toll, when he must well know on sight the correct amount he is authorized to charge; but in the case of a person claiming exemption, the right of the party to the exemption cannot, as a matter of course, be within the collector's knowledge, and he may in exacting toll in such a case be acting *bonâ fide*, believing he is entitled to exact it.

Take the case of the exemption claimed in this instance. It appears that the complainant is the owner of two farms separated by the road in question, one of which farms he had recently purchased. In passing from one farm to the other he apparently has to pass through the toll gate, and his exemption from toll arises under the provisions of the 8th sub-section of sec. 91 of the act inflicting the penalty, or the second section of chapter 86, Consol. Stat. C., an exemption which he can only claim when going to and returning from work on his farm, or for farming and domestic purposes. He was not exempt, as stated in this conviction, from the payment of any toll on the 10th January. He was only exempt if passing within the meaning of either of these statutes, and whether he was doing so or not the collector had to decide.

Was it the intention of the Legislature to punish a collector summarily if he erred in this respect? If it was, the statute should have put the matter beyond doubt by express words, such as adding to the section in question "or takes toll from a person exempt by law, and who claims the exemption."

But if even by intendment we could say this conviction was for an offence within the meaning of the 89th section, the conviction would, we think, be still defective for not stating the grounds of exemption and the fact of the exemption being claimed, so that the court could see that an offence was committed.

It also appears on the conviction that the offence complained of was the taking toll on the 20th January for passing the gate on the 10th. It appears from the evidence returned that no toll was exacted on the 10th, when the alleged passing of the gate took place: that the collector was in the habit of giving credit to the complainant for tolls: that on settling an account of 80cts. a dispute arose as to the toll in question: that the complainant objected, and subsequently sent his son with the twelve and a-half cents, and then laid an information. Upon this ground we are inclined to think that the conviction is defective, although it is not necessary so to decide.

We are of opinion the conviction cannot be supported, as it shews a case not within the words of the statute; and that the rule must be made absolute.

*Rule absolute.*

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### CAMERON v. BORROWMAN.

*Sale of land—Misrepresentation—Equitable plea.*

To a declaration on a covenant to pay \$500, defendant pleaded, on equitable grounds, that the plaintiff agreed to sell to the defendant certain land, which the plaintiff represented that he had purchased from Government, and was entitled to obtain a patent for on payment of \$500: that defendant thereupon covenanted to pay the plaintiff the \$500, and plaintiff covenanted that on receiving it he would cause a patent to be issued in defendant's name: that defendant had always been ready to pay; but that the plaintiff had not purchased from the Government and had no right to the land, nor could he procure a patent; and if defendant paid him the \$500, he would receive no consideration, and would be unable to recover it back.

*Held*, a bad plea, for the agreement was not alleged to be the same as that sued on; no fraud was averred; no definite misrepresentation which induced defendant's contract; no breach of contract on the plaintiff's part was stated; and no ground for an injunction shewn.

DECLARATION, that the defendant, by deed, &c., cove-

nanted to pay the plaintiff \$500, together with interest on \$2000, six months after the date of the deed, but did not pay the same, &c.

Plea, on equitable grounds, that by agreement between the plaintiff and the defendant, the plaintiff agreed to sell to the defendant, and the defendant agreed to buy from the plaintiff, certain lands, which the plaintiff then represented to the defendant that he, the plaintiff, had purchased from the Government of Canada, and that he, the plaintiff, was entitled to obtain from the Government of Canada a grant in fee simple for the said lands upon payment of \$500 ; and thereupon the defendant covenanted with the plaintiff to pay him the said sum of \$500, and the plaintiff covenanted with the defendant that he, the plaintiff, would immediately after payment of the said sum of \$500 cause to be issued letters patent from the Crown for the said land, to and in the name of the defendant, free and clear of all incumbrances done by him, the plaintiff. And the defendant says that he has always been ready and willing to pay the said \$500, but that the plaintiff has not purchased the said land from the Government, nor has he any right, title, or interest thereto or therein, nor is he entitled to nor can he procure such patent on payment of the said sum of \$500. And the defendant says, that if he paid the said sum of \$500 to the plaintiff, he would receive no consideration therefor, and would be unable to recover it back from the plaintiff.

Demurrer, on the ground that it does not appear by the plea that defendant was misled by the alleged representation : that there is no allegation of fraud : that the plea discloses no legal or equitable defence : that the covenants are independent ; and that the facts set out would not entitle the defendant to an unconditional and perpetual injunction.

*Holmested*, for the demurrer, cited *Bill v. Richards*, 2 H. & N. 311 ; *Nelson v. Stocker*, 4 DeG. & J. 458 ; *Yates v. Gardiner*, 20 L. J. Ex. 327 ; *Sibthorp v. Brunel*, 3 Ex. 827 ; *Spiller v. Westlake*, 2 B. & Ad. 157 ; *Mattock v.*

*Kinglake*, 10 A. & E. 50 ; *Stovin v. Dean*, 26 U.C. R. 600 ;  
Day's C. L: P. A. 278.

*Anderson*, contra, cited *Gale v. Hubert*, 6 Grant, 312.

MORRISON, J., delivered the judgment of the court.

We are of opinion that the plaintiff is entitled to succeed on this demurrer. One defect in this plea, and which was not noticed on the argument, is, that the agreement to which it refers and upon which it is based is not averred, nor does it appear to be, the one set out in the declaration, or in any way connected with the covenant declared on ; and upon that ground alone the plaintiff would be entitled to our judgment.

But assuming that it refers to the deed and covenant upon which the plaintiff is going, we think it forms no answer to the plaintiff's cause of action. It does not clearly appear by the plea what the representation or misrepresentation complained of is, whether of the fact that the plaintiff had purchased the lands from the Government at all, or that being the purchaser he was entitled to a grant of them on payment of \$500.

Be that as it may, there is no charge of fraud, no allegation that the representation referred to was made fraudulently, or with an intent to deceive, or to induce the defendant upon the faith of it to enter into the contract, nor is it alleged that the defendant entered into the agreement upon the faith of the truth of the representation that the plaintiff had purchased the lands from the Government, or that he was entitled to a patent for them on payment of \$500. The contention on the part of the defendant is, that the plaintiff was guilty of a fraudulent misrepresentation which induced the defendant to enter into the covenant. The plea does not state facts to support or lay a foundation for such a defence.

For anything that appears in the plea the plaintiff's representation as to the purchase may have been made in good faith and honestly at the time, believing that he was the purchaser ; the purchase may have been made by



another for his benefit. The same as to the amount to be paid to the government; he may have believed it to be \$500, while it turned out to be \$550, or any other amount. It is equally consistent whether the plaintiff was the purchaser or not, or whether he could obtain a patent on payment of \$500 or a higher amount, that for anything appearing in the plea the representation of the facts did not influence the conduct of the defendant, or induce him to enter into the covenant on his part.

There has been no breach of contract on the part of the plaintiff. The covenant of the defendant to pay the \$500 is a condition precedent to anything being done by the plaintiff. For all that appears it is within the power of the plaintiff to fulfil his agreement on payment of the \$500, by procuring the patent to be issued in the name of the defendant.

We see nothing in the allegation at the end of the plea, that if the defendant paid the \$500 he would receive no consideration. He has the independent covenant of the plaintiff, that he will, on payment of the \$500, cause the patent to issue to him, the defendant, and which, we take it, was the security and remedy the defendant relied on, should the plaintiff fail in performing his part of the agreement.

On the whole, we are of opinion that the plea is bad as a legal plea, and that the circumstances disclosed are not such as would induce a court of equity to grant a perpetual, unqualified and unconditional injunction; and consequently the plaintiff must have judgment.

*Judgment for plaintiff.*

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## IN THE MATTER OF GARRATT &amp; CO., INSOLVENTS.

*Insolvency—Deed of composition.*

A deed of composition and discharge under sec. 8, sub-sec. 4, of the Insolvent Act of 1864, purporting to be between the insolvents of the first part, and a majority of the creditors, of \$100 and upwards, of the second part, was *Held* invalid, because not executed by the insolvents. Such a deed to be operative must provide for the separate creditors of each partner as well as those of the firm.

A purchase of goods by persons unable to pay their debts in full is not fraudulent within sec. 8, unless such inability is concealed from the creditor with intent to defraud him.

APPEAL from the order of the Judge of the County Court of the County of Hastings, confirming the deed of composition and discharge made by the insolvents.

The deed was as follows :—This indenture, made on the 8th day of August, 1868, between Caleb Garratt and J. H. Williamson, merchants, of, &c., trading under the name, style and firm of Garratt & Co., of the first part, and the several persons whose names and seals are hereto subscribed and affixed, being also respective creditors, or agents or attorneys of creditors, of the said Garratt & Co., and being a majority in number of those of the creditors who are respectively creditors for sums of one hundred dollars and upwards, and who represent three-fourths in value of the liabilities of the said Garratt & Co., of the second part,

*Whereas* said Garratt & Co., on or about the 4th of July, 1868, made an assignment of their estate and effects under the Insolvent Act of 1864 and 1865, to John Parker Thomas, of the Town of Belleville, County of Hastings, Esquire, Official Assignee for said County of Hastings.

*And whereas* the said Garratt & Co. have proposed to compromise with their creditors by the payment to them of the sum of ten shillings for every pound of their indebtedness, to be paid in the following manner, namely, by notes payable at five, ten, and fifteen months respectively from their several dates, said notes to be made by the said Garratt & Co., and endorsed, for the better securing the payment thereof, by Townsend Garratt and Richard S. Garratt, both of the Township of Murray, &c. :

*And whereas* the said creditors have accepted such proposition and composition secured as aforesaid :

*Now this Indenture witnesseth*, that in consideration of the premises the said parties of the second part have discharged and released and by these present do discharge and release the said Caleb Garratt and J. H. Williamson, their heirs, executors, administrators, and assigns, of, from and against all debts, claims, and demands whatsoever, against the said Caleb Garratt and J. H. Williamson, and provable against their estate.

*In witness whereof* the said parties have hereunto set their hands and seals,

(Signed)      ROBERTSON, STEPHEN & Co. [L.S.]

And seventeen other creditors.

Signed, sealed and delivered }  
in the presence of                }

All firms apparently but one signed in like manner in the partnership name, and the insolvents did not sign at all.

The allowance of the composition and discharge was opposed by the present appellants. The learned Judge disposed of the case, and pronounced the following judgment :

Mr. *Henderson*, who appeared for Allan & Co., objected,

1. That the deed purports to be between the parties (debtors and creditors), and is not executed by the insolvents.

2. That the deed only relates to partnership debts of the insolvents, and will not therefore bind a non-assenting creditor for any debt, partnership or otherwise.

3. The deed should have been for the benefit of all creditors, without distinction as to partners or otherwise.

4. The insolvents purchased goods from Allan & Co. on the 4th of June last, when they knew they could not pay their debts.

The 9th section of the statute of 1864, sub-sec. 1, provides that a deed of composition and discharge, executed by the majority in number and three-fourths in value, &c., shall with regard to the remainder of the creditors be binding to the same extent upon them as if they were also parties

to it. There is nothing in this clause that requires the deed to be executed by the insolvent. The deed if executed outside the Act would certainly have been binding without it.

I am not without some doubt on the second objection, that the deed should purport to be executed by the creditors generally.

It is not clear, upon reading it attentively, that the meaning attached to it by the counsel of the opposing creditors is correct, and that the parties who executed did not intend by the words "Garratt & Co." to mean the firm, but to describe the insolvents by that name. In reciting the deed of assignment made by the insolvents, it is stated that the said "Garratt & Co." executed it, whereas it was executed by the insolvents in their individual capacity, and not in the name of Garratt & Co. It will also be observed that the creditors release Caleb Garratt and J. H. Williamson, and not Garratt & Co. I am therefore inclined to think the construction put upon the deed, that it referred to all the creditors, is not forced. I am not satisfied the objection is good in opposing the confirmation under the section referred to, and if available at all to the opposing creditors, it can only be in the action they caused to be brought against the insolvents to recover their debt. The cases cited by Mr. Henderson might then be applicable. The requirement as to number of creditors and value of liabilities has been complied with. The fact was not disputed.

As to the fourth objection. If the test of fraud in contracting the debt of the opposing creditors is that the insolvents were unable to pay their debts at the time it was contracted, the objection should prevail. My impression from the examination of the insolvent Garratt is strong, that at no time from his commencement of business in Belleville until the assignment was executed, were the firms with which he was connected able to pay their debts in full. They commenced without any cash capital and with very little property. From time



to time capital seems to have been brought into and sunk in the different concerns. They seemed, however, to think they would be able to work through, until legal proceedings were taken against them, when they properly assigned their property for the benefit of their creditors.

The debt of Allan & Co. was contracted by the insolvents, as far as I can see, at the solicitation of the agent of Allan & Co., and without any representations on the part of the insolvents as to their position; and from all I can gather they were as well able to pay their debts as at any previous time. No fraud can, I think, be properly imputed to them in this or in any other respect as to the manner of carrying on their business.

I therefore grant their discharge absolutely.

Allan & Co., the opposing creditors, appealed on the following grounds:

1. That the deed of composition and discharge purports to have been between the parties, and it is not executed by the insolvents.

2. The deed relates only to partnership debts of the insolvents, and does not bind non-assenting creditors for any partnership debt or otherwise.

3. The deed should have been for the benefit of all the creditors, without distinction as to partners or otherwise.

4. The insolvents purchased goods from the appellants on the 4th of June last, when the insolvents knew they could not pay their debts in full.

5. The deed is illegal, insufficient, and unreasonable.

*Mackenzie*, Q. C., supported the appeal. The deed should have been made for the individual creditors of the insolvents, as well as for the creditors of their partnership: *Tomlin v. Dutton*, L. R. 3 Q. B. 466; *Rixon v. Emary*, L. R. 3 C. P. 546; *Ex parte Glen*, L. R. 2 Ch. App. 670 (a). The deed is not signed by the insolvents at all, although it purports to be made between them of the one part and their

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(a) See also *Brett v. Jackson*, L. R. 4 C. P. 259, 263.

creditors of the other part. The creditors, also, do not properly execute the deed; they sign in their partnership names, not in their individual names. The purchase by the insolvents, when they knew they could not pay for the goods they bought, was a fraud under section 8 of the act.

*Ponton*, contra. By the Imperial Act 24 & 25 Vic., ch. 134, sec. 192, the deed of composition and discharge must contain an assignment of the bankrupt estate. The bankrupts must therefore be parties to it and must execute it. In this country the deed of composition and discharge follows the assignment, which the insolvents make as the first step under the statute. The assignment having been made, the insolvents have no estate to convey; there is no necessity therefore for their being parties to the deed. The original assignment by the insolvents, and subsequent composition and discharge by the creditors, together constitute a complete instrument, and as complete as is required to be executed under the English statute: *McNaught v. Russell*, 1 H. & N. 611; *Clapham v. Atkinson*, 4 B. & Al. 722, 730; *Hodgson v. Wightman*, 1 H. & C. 810; *Dingwall v. Edwards*, 4 B. & S. 739. The case of *Rixon v. Emary*, L. R. 3 C. P. 546 shews that a deed not made for creditors of the individual debtors may be supported by averment that there were no such separate creditors: *Bamford v. Clewes*, L. R. 3 Q. B. 729; *Holt v. Grey*, 13 Grant, 568.

ADAM WILSON J. delivered the judgment of the court.

The mere fact of a trader purchasing goods who is at the time unable to meet his engagements is neither fraud nor within the provisions of the Insolvent Act. A purchase may under such circumstances be the very best and wisest act which the trader could do, and may be the most beneficial act also for his creditors. Such a purchase may be the very means of re-instating him and relieving him from difficulty.

If any such cramped and narrow rule were established as the appellants contended for, it would deter every one

in adversity, no matter from what cause, from attempting to right his fortunes, although he had the strongest confidence and almost an assurance that he should by frugality and increased exertion be able to overcome what he considered to be only a temporary trial.

Nothing could be so disastrous to all business men, creditors as well as debtors, to destroy this hope and confidence of traders.

It is notorious that the most successful traders are those who have commenced with nothing but a good name and credit, or, as they are commercially styled, self-made men; but these men could never begin at all if this rule were applied, or they must stop at once whenever they met with a check by the failure of their bankers, the dishonesty of their debtors, by fire, robbery, or other superior agency. The law is not so unreasonable and self-destructive. Inability to pay is no more fraud, though it was thought so in former times when bankruptcy was esteemed a crime, than solvency is honesty, though some may think it is.

The statute in this particular case requires that the purchase should have been made not only while the debtor knew he was unable to meet his engagements, but that he concealed such inability from his creditor with the intent of defrauding him, to deprive him of the benefit of its provisions. There is nothing like such facts proved against the insolvents, and the learned Judge was quite right in overruling this objection taken to their discharge.

The remaining objections are, that the insolvents are no parties to the deed, and it is therefore void; and that the deed provides for creditors of the partnership only, and not for the separate creditors of the individual partners.

The argument that the deed need not be made by the insolvent, because he has already assigned all his estate to the assignee, and that the composition and discharge can be effectively perfected by the creditors alone, and that the statute makes their deed sufficient because it speaks of a deed executed by the majority in number of *the creditors*, cannot, we think, be supported.

This document professes to be an indenture made between the insolvents of the first part, and the creditors of the second part. And the parties of the first part have stipulated for the payment of the composition in a particular time and manner, so that an action of covenant would have lain against them if they had executed the deed. As a deed at the common law it must unquestionably be void to bind non-assenting creditors, though it may be binding on those who do execute it: *Morgan v. Pike* (14 C. B. 473.)

Nor does the statute authorize a deed to be executed by the creditors alone. The 9th section of the act of 1864 enacts "that a deed of composition and discharge executed by the majority in number of those of the creditors of an insolvent who," &c., "shall have the same effect with regard to the remainder of his creditors, and be binding to the same extent upon him, and upon them, as if they were also parties to it; and such a deed may be validly made either before, pending, or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent; and the discharge therein agreed to shall have the same effect as an ordinary discharge obtained as hereinafter provided."

If such a deed were made *before* an assignment in insolvency, it is manifest the debtors must be parties to it, and must execute it, at any rate if they engage to do anything, or to transfer any property by it.

The words of this section "and be binding to the same extent upon him and upon them as if they were also parties to it," refer to "the remainder of the creditors;" they do not mean that the *insolvent* need not be a party to it, because it is manifest the creditors who execute it cannot force a composition on him against his interest. He must of necessity therefore be a party to it. And although the insolvents may be parties to it as respects those creditors who have signed it, they are not parties to it as to those who have not assented to it or joined in it.

The deed, to be operative under the act, should have provided for the creditors of the respective partners as well



as for the creditors of the two as partners. The act of 1864, sec. 5, sub-secs. 2, 5, shews these several claims are provable, and therefore must be provided for in the deed of composition and discharge.

The case referred to supports Mr. Ponton's argument, that it may be averred there were no other creditors, to be provided for but those for whom and with whom the deed was made, and this is as we should have supposed the law to be. The case of *Tomlin v. Dutton*, (L. R. 3 Q. B. 466,) shews that a deed of this kind pleaded without such an averment would be bad on demurrer.

It is not quite clear there were no creditors of the separate members of the firm to be provided for. J. H. Williamson borrowed money from his mother to put into the firm, and he still owed her a part of it when the deed was executed; but he said it was a gift, and that she could not sue for it, and that he had arranged with her to give a year's service to her and to his brother, these two living together, and the debt was to be wiped out. The learned Judge must have thought this was not a debt at all, or not one subsisting when the deed was made, and with his decision on this point we do not think we should interfere.

The result is, we must determine against the validity of this indenture, because the insolvents, who profess to be the parties to it of the first part, are not parties to it by executing it as they should have done, and non-assenting creditors are therefore not bound by it.

The appeal will therefore be allowed, and the order of the learned Judge of the court below granting the discharge of the insolvents must be rescinded; the costs of this application to be costs against the estate.

*Rule accordingly.*

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## WILSON V. THE NORTHERN RAILWAY COMPANY OF CANADA.

*Northern Railway Co. — Obligation to fence—20 Vic. ch. 143.*

The plaintiff, by permission of one H., put his cattle into a pasture field of H. adjoining defendants' railway and the evidence went to shew that they escaped thence into an adjoining field occupied by one J., and thence on to the track, where they were killed by a train passing. The plaintiff sued, alleging that the horses escaped from the field where they were pasturing by reason of defects in the railway fences.

*Held*, affirming the judgment of the County Court, that he could not recover, for the horses were not in the field from which they escaped by the owner's permission.

The preamble to 20 Vic. ch. 143, which applies to this company the clauses of "The Railway Act" with respect to fences, has not the effect of extending their liability beyond that of other companies subject to the same provisions.

APPEAL from the judgment of the County Court of the County of Simcoe, discharging a rule *nisi* to set aside a non-suit.

The facts are fully stated in the following judgment given in the Court below:—

GOWAN, Co. J.—The declaration charges the duty of maintaining fences, &c., on the defendants in respect to lands of William Hill, through which their road passes: that the defendants did not maintain the fences as required by law; and that by means thereof oxen of the plaintiff, which, with the consent, &c., of William Hill, were pasturing on his land, escaped therefrom over the said fence into the railway, and were killed by the defendants' locomotive on the track.

The defendants pleaded not guilty, by statutes 12 Vic. ch. 196, Consol. Stat. C. ch. 66.

The plaintiff called several witnesses, and from their testimony I collect the material facts as follow:—One William Hill was the lessee of certain lands through which the defendants' road passes. The plaintiff, by permission of William Hill's agent, in July or August last, was allowed to put his cattle in a pasture field (part of these lands) as long as the pasture lasted. Adjoining this field easterly was an orchard and garden with a dwelling house attached,

which, before the plaintiff turned his cattle into the pasture field, and until after the accident, was in the possession of one John Hill, and westerly lay an unenclosed bush-lot belonging to one Patterson. All three parcels, the pasture-field, the orchard and bush-lot, adjoined the defendants' track, separated from the road by the usual snake-fence. There was a gate in the orchard field to a farm-crossing therefrom. The fence between the pasture-field and Patterson's bush was good, and at some distance from the track there were bars opening from the field into the bush.

The fence between the pasture-field and the railway was spoken of as good, with the exception of one witness, who said one or two rails had fallen down. The fence dividing the orchard was also in good order, all except an opening therein close to the gate, caused by some of the blocks between the rails having fallen out. On the 5th of October the plaintiff's cattle were killed on the track.

The evidence was pointed to shew that the plaintiff's cattle got from the pasture field over the fence which separated it from the orchard (which fence was low and insufficient), into the orchard, and from thence through the opening beside the gate in the orchard field into the railroad. There was no agreement for payment for the pasture by the plaintiff when the cattle were put in. After the accident an agreement for payment was made with William Hill's agent.

There was no permission by William Hill to let the cattle into the orchard, only into the pasture-field, nor by John Hill, who occupied the house and orchard field. On the contrary, he had root crops in, and was anxious to keep cattle out on that account, and also to prevent injury to the fruit trees, which he had arranged to look after.

The evidence seemed to me rather to shew that the cattle must have escaped into Patterson's bush, and from thence by some means on the defendants' track. It seemed to me quite clear that it must have been either from Patterson's bush or through the opening beside the gate that the cattle got on the track, and so the case was treated till

the close. Though I see I have not noted it, one of the witnesses certainly did say that one or two riders had fallen down on the fence between the pasture-field and the track.

Assuming either that the cattle got out by the opening in the orchard field or by Patterson's bush, and from thence strayed upon the track, I held that there was no case to go to the jury; and it was then suggested and urged that they might have got over in the place where the riders were down; but I did not commit the case to the jury upon this mere surmise, and the plaintiff was non-suited.

The plaintiff accepted a non-suit, and on leave reserved now moves for a new trial.

Now, as to the first ground. Assuming that the cattle having escaped from the pasture-field were in the orchard, and got from thence on the track, it is contended that it was the duty of Hill to maintain the fence between the orchard and the pasture-field, and having failed to do so he could not have seized the cattle damage feasant, and so the cattle were not trespassers: that he is the only person who could object, and that, as against the defendants, the cattle must be presumed to be there lawfully. I do not find any authority to support this view as to the liability of the defendants. The declaration charges that the cattle escaped from the land where they were pasturing by reason of the insufficiency of the railway fences, and this evidence does not support that statement. But whether as between Hill and the plaintiff the cattle were or were not trespassers in a certain sense, the cattle were certainly not there by John Hill's permission or by the permission of William Hill's agent, as he expressly said. Indeed, according to the evidence William Hill would have no right to give the plaintiff license to let his cattle into the orchard, having already granted the use of it and the crops therein to John Hill for taking care of the premises. But, as I understand the law under the railway act, the plaintiff must be the owner of the land, or have been in occupation by the license of the owner or some one entitled to represent him, to be enabled



to recover damages occasioned by the omission to fence, and there was not one tittle of evidence to support such a contention. I refer to *Dolrey v. Ontario, Simcoe &c., Railway Co.*, 11 U. C. R. 600; *Gillis v. Great Western Railway Co.*, 12 U. C. R. 427; *Connors v. Great Western Railway Co.*, 13 U. C. R. 405, 406; *Auger v. Ontario, Simcoe & Huron Railway Co.*, 16 U. C. R. 92; *Chisholm v. Great Western Railway Co.*, 10 C. P. 324; *Henderson v. Grand Trunk Railway Co.*, 20 U. C. R. 602; *Brown v. Grand Trunk Railway Co.*, 24 U. C. R. 350; *McLennan v. Grand Trunk Railway Co.*, 8 C. P. 411.

As to the second ground, that the defendants are liable for injury to cattle killed on the road through defect of fences, regardless of where they came from and whether they were or were not on lands of the proprietor with his privity, or by his license; this is not the case the plaintiff sets up by his declaration. He says that his cattle were by consent of the proprietor pasturing on his lands, and that by defect of the fences, which the defendants were bound to maintain, they escaped on the track and were killed; and even if his contention was right, he did not make out the case he set up. At all events it seems to me needless to do more than refer to *Dovaston v. Payne*, 2 Smith's Leading Cases, 5th ed., 132; *Buxton v. North Eastern R. W. Co.*, L. R. 3 Q.B. 549, and the cases cited above, which I think settle the question, and shew that the nonsuit was right.

On the last ground I think I rightly withdrew the case from the jury. It was not the ground on which the case was opened and to which the evidence was directed, and was evidently not thought of till the last moment; and the mere surmise that the cattle possibly got over where a rider was down (fat heavy cattle) and escaped direct from the pasture field, did not justify me in leaving the case to the jury, nor do I think it would warrant the granting a new trial in this case. The late cases shew that where there is a mere scintilla of evidence a Judge ought not to leave it to a jury: *Avery v. Bowden*, 6 E. & B. 953; *Wheelton v. Hardisty*, 8 E. & B. 232. Upon this point there was no evi-

dence that ought reasonably to satisfy the jury that the fact sought to be proved was established, and I think therefore the nonsuit was right.

The rule is discharged on all the grounds.

From this judgment the plaintiff appealed.

*Boys* for the appellant.

*McCarthy*, contra.

ADAM WILSON, J., delivered the judgment of the court.

[After stating the facts and the judgment appealed from.] We have nothing to add to this opinion, for we adopt it in full, and it is the only judgment which can be pronounced, unless the 20 Vic. ch. 143, makes a difference in the liability of the defendants, as Mr. Boys contended it did, from what their liability was under their former act, 12 Vic. ch. 196, sec. 18, under which alone the former decisions affecting this company had been pronounced. The preamble to this act recites that is expedient and necessary to alter and amend the 12 Vic. ch. 196, in order to afford a just and proper protection, not only to the owners of lands adjoining the line of the Ontario, Simcoe, and Huron Railroad Union Company's Railway, and works connected therewith, *but to all persons whatever* from damage to their horses, cattle, or their animals, by the trains or engines on the said railway; and whereas the 18th section of the said act does not sufficiently provide therefor, it is desirable and necessary to provide for the fencing and separation of the whole line of such railway from the neighboring lands. Therefore Her Majesty enacts as follows:—1. The 18th section of the said act shall be repealed. 2. From and after the time when this act shall come into force, the clauses of the "Railway Clauses Consolidation Act," with respect to and entitled *Fences*, shall be incorporated with the acts incorporating the said company.

Now under these general provisions, which are contained in the Consol. Stat. C. ch. 66, secs. 13 to 19 inclusively, other railway companies subject to the same enactments are not held to be bound to fence against *all persons*

whatever, because the provisions do not entail such a responsibility upon them, and we cannot import by mere recital so unusual and important an alteration against this company by virtue of words which cannot by possibility bear such a construction by their direct natural import, and which cannot be made applicable to any other company governed by the same law.

A clear and explicit enactment is not to be cut down by a more limited preamble or recital ; but if the enactment is not explicit in itself it may be explained and cut down by the recital or preamble : *Hughes v. Chester, &c. R. W. Co.*, (1 Dr. & Sm. 524, 9 W. R. 760). It is a general rule in the construction of statutes that the preamble may extend but cannot restrain the effect of an enacting clause : *Kearns v. Cordwainers Co.*, (5 Jur. N. S. 1216).

This doctrine will not avail the plaintiff, for it does not mean that plain, direct, and positive language shall be wrested to a different meaning from what it bears to make it correspond with an inapplicable incongruous recital : See also *Walker v. Richardson* (2 M. & W. 889), per Lord Abinger, C. B.

In *Trueman v. Lambert* (4 M. & S. 239), per Dampier, J., the rule is thus stated : "I have always understood it as a standing rule in the construction of Acts of Parliament, that the enacting clause shall not be restrained by the preamble, if the enacting words are large enough to comprehend the case."

Our opinion is the sections of the statute do expressly specify against whom the defendants are to fence, and that they are not bound to fence against all persons whatever ; and therefore the plaintiff, even if he could strike out all the special matters about the consent of the owner of the adjoining lands, and the company's obligation to fence as against him, would not shew a sufficient cause of action, nor would he have proved one.

But we are of opinion he cannot set up a different case from the one he has stated, and he has most certainly not proved that which he has alleged.

Even if he could recover against the company for cattle straying off lands which were there against the consent of the owner, he cannot be in a better position in this respect than the owner himself would have been if he had been plaintiff. And from the evidence it is quite obvious that the defect of fences at the gate of the orchard, was from the act of the owner himself and of those he suffered to come to or leave his place, by climbing over the fence and gate, and carelessly displacing the blocks on which the rails rested, and wilfully and carelessly leaving them so displaced when a few minutes would have replaced them. Against such conduct the company cannot be held responsible.

Upon the whole, then, we think the non-suit was right, and the rule must remain or be made absolute as directed. The appeal will be dismissed with costs.

*Appeal dismissed.*

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PATTERSON V. MCGREGOR.

*Crim. Con.—Separation by plaintiff's misconduct—How far a defence.*

To an action for criminal conversation the defendant pleaded,—1. That the plaintiff had been guilty of adultery with one L., by whom he had a child now living with him, and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence towards her, and finally put her away from him by force, and threatened to put her to death if ever she returned to him, so that she was in danger of her life, and did live apart from him permanently. 2. That the plaintiff's wife had, while so living apart from him, obtained an order for protection under the Statute, after due notice to the plaintiff of her application therefor, which order was duly registered and is in full force.

*Held*, on demurrer, A. Wilson, J. dissenting, that the pleas shewed a good defence.

DECLARATION.—For that the defendant debauched and carnally knew the plaintiff's wife.

Second plea: that long before the committing of the pretended trespass in the declaration set forth, the plain-



tiff had been guilty of adultery with one Isabella Lowe, on whom he had begotten a child now living with the plaintiff, and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence towards her, and finally put her away from him by force, and threatened to put her to death if ever she returned to him, so that she was in danger of her life, and did live apart from him permanently.

Third plea : that long before the committing of the said pretended trespass, the plaintiff's wife had, while living separate from him as aforesaid, on account of the plaintiff's adultery and cruelty as aforesaid, applied for and obtained an order for protection, according to the statute in such case made and provided, after the plaintiff had received due notice of the application therefor, which order was duly registered, and has ever since been and now is in full force and effect, by reason whereof the plaintiff lost all claim to the comfort and society of his wife.

Demurrer to both pleas, and joinder.

*Harrison*, Q. C., for the demurrer, cited, *Wyndham v. Wycombe*, 4 Esp. 16 ; *Bromley v. Wallace*, Ib. 237 ; Add. T., 2nd ed., 800 ; *Weedon v. Timbrell*, 5 T. R. 357 ; *Chambers v. Caulfield*, 6 East 244 ; *Calcraft v. Earl of Harborough*, 4 C. & P. 499 ; *Harvey v. Watson*, 2 D. & L. 343 ; *Mason v. Mitchell*, 11 L. T. Rep. N. S. 714 ; *Wilson v. Leonard*, 5 Ir. Jur. O. S. 101, *Brunker Dig.* 1131 ; Consol. Stat. U. C. ch. 73, sec. 6.

*Maclennan*, contra, cited *Saund.* Pl. & Ev. vol. i. p. 875, 881 ; *McMillan v. Jelly*, 17 C. P. 702 ; *Winter v. Henn*, 4 C. & P. 494 : *Dysart v. Dysart*, 1 Robertson Ecc. Rep. 470 ; *Marsh v. Marsh*, 1 Sw. & T. 312 ; *Waddell v. Waddell*, 2 Sw. & T. 584 ; *Seddon v. Seddon*, Ib. 640 ; *Wilton v. Webster*, 7 C. & P. 200 ; *Shelf.* on Marriage, 390.

MORRISON, J.—This demurrer raises the question whether a plaintiff who has misconducted himself, treating his wife with cruelty, and compelling her by force and violence to

separate herself from him permanently, can maintain this kind of action, based on acts of adultery of the wife subsequent to their separation under such circumstances.

This form of action was abolished in England by Statute some ten years ago, and our judgment must be guided by the state of the law as it then stood.

The plea itself is rather a novelty in pleading, although we find a somewhat similar plea in principle allowed to be pleaded by the full court in *Harvey v. Watson* (7 M. & G. 644). The principal case upon the authority of which it is contended that this is a good plea in bar, is that of *Weedon v. Timbrell*, (5 T. R. 357). The case was tried before Lord Kenyon (1 Esp. 16). He non-suited the plaintiff, ruling at the trial that the ground of the action was the depriving the husband of the society and comfort from the company of his wife; and that if they lived in a state of separation when the offence was committed, the action could not be maintained. A rule *nisi* was obtained for a new trial, one of the grounds being that the gist of the action was the act of criminal conversation; and consequently the separation did not take away the cause of action, however it might operate in mitigation of damages. On this ground alone the case was argued by Garrow for the plaintiff and Erskine for the defendant. The court, consisting of Lord Kenyon, Ashurst, Buller, and Grose, JJ., discharged the rule. Lord Kenyon in giving judgment says: "It is material to consider what is the gist of this action: the plaintiff contends that it is the criminal act; but that I deny. I think it is a civil action, brought to recover satisfaction for a civil injury done to the husband, and not to punish the defendant for having broken the laws of morality and decency. But what injury is done to the plaintiff, who has voluntarily relinquished his wife? It cannot be said that he is deprived of the comfort and society of his wife. I can see the immorality of the defendant's conduct in as strong a light as any person; but still this action must be confined within legal limits. \* \* \* This is not like the instance put of a temporary separation from

the wife ; in such case the wife still continues within the protection of the husband, which she does not here." An opinion of Lord Mansfield was referred to on the argument, and Lord Kenyon ended his judgment by saying, "Before I saw the opinion of Lord Mansfield in the case before him, I thought that this action could not be supported ; and I am now confirmed by what his lordship there said, because that, which is the gist of the action, fails."

Ashurst, J., said : "The gist of this action is the loss of the comfort and society of the plaintiff's wife \* \* Then taking that as the principle, it follows that, if the husband separate himself from his wife, he cannot be said to be deprived of that comfort and society which he has before renounced. \* \* It cannot be said that the plaintiff has sustained the injury which he has imputed to the defendant. And the opinion of Lord Mansfield in the case cited coincides with ours."

Now what is set out and contained in the plea here goes far beyond the matters held as a defence and bar in that case, and unless we see some subsequent binding authority liberating us from that decision, I take it we are not at liberty to overlook it.

It is true that the decision in *Weedon v. Timbrell* has been commented on, and questioned as sound law, upon the ground that the propriety of that judgment was doubted in the case of *Chambers v. Caulfield*, (6 East, 244) ; and in some books it is treated, upon the authority of that case, as being virtually overruled. But we find at times in the best works deductions stated upon the strength of cases cited, a reference to which does not justify the text or opinion of the author.

The case of *Chambers v. Caulfield* was one tried before Lord Ellenborough, in which there was a verdict for the plaintiff. To understand the case properly we have to look at the circumstances at the trial. It appears that differences and occasional separations happened between the plaintiff and his wife ; that a trust deed was entered into between them ; that they lived together after the deed ;

and that subsequent thereto the adultery took place, when their final separation followed; but no evidence was given that the separation was with the consent of the trustees, which the deed required; for previous to the plaintiff leaving England upon military service for a few weeks, he had written letters to his wife soliciting a reconciliation, and pressing her to return to his house, which she did not do until he departed, and on his return he found his wife and the defendant there, when the discovery of the adultery was made. A rule *nisi* was had, on the ground that previous to and at the time of the act of adultery the plaintiff was living in a state of separation from his wife by virtue of the deed, and that according to the case of *Weedon v. Timbrell*, the action, being founded on the loss of comfort and society of the wife, would not lie. Upon the granting of the rule *nisi* Lord Ellenborough desired that the case might be argued upon the general point, whether the mere fact of a separation between husband and wife by deed was such an absolute renunciation of his marital rights as precluded the husband from maintaining an action for the seduction of his wife, saying that he did not consider that question as concluded by the decision in *Weedon v. Timbrell*. The case was argued at length by very able counsel on both sides, and the court took time to consider their judgment, which was delivered by Lord Ellenborough, who said: "It is unnecessary to say anything more respecting the deed, than that it seems not to have been meant to provide for any separation, but such separation as should take place with the approbation of the trustees. \* \*

The consequence is, that if Mrs. Chambers left her husband *without* the approbation of the trustees (and upon the evidence before us she must be taken so to have done), then she was not at the time of the criminal intercourse living separate from him by his consent, and of course the event and situation provided for in the deed has not happened; and in that view of the case, there can be no question but that the plaintiff's right to recover is not affected by this deed; and if she did leave her husband



with such approbation, the husband has not in this case (as he was holden to have done in the case of *Weedon v. Timbrell*), given up all claim to be derived from her comfort, society, and assistance; the consequence of which is, that the case of *Weedon v. Timbrell*, allowing it the fullest effect according to the terms, cannot be considered as an authority against the plaintiff in the present action."

It will be noticed that a clause in the deed provided, in case of separation with the approbation of the trustees, that Mrs. Chambers might take with her the two youngest children and such others as she might afterwards have, &c., and visit the other children at the plaintiff's house, especially when ill, so as to require *the attention of a mother*.

Carefully considering the report in that case, I cannot see in what way it affects the judgment in *Weedon v. Timbrell*, except that it may be inferred from the *obiter dictum* of Lord Ellenborough when the rule *nisi* was moved that he was not satisfied with it. The circumstances of the two cases are widely different. Nothing, I think, can be inferred from his desiring that the general point of a separation by deed should be argued, as it did not appear in the case before Lord Kenyon that the separation was by deed. It is worthy of note that, although the case was argued as desired, no judgment was given on the point, or intimation that the decision in *Weedon v. Timbrell* was not considered a binding authority. I may here also remark that Grose, J., who joined in the judgment with Lord Kenyon, was senior Judge in the Queen's Bench when *Chambers v. Caulfield* was decided.

It is upon the authority of that case, nevertheless, that the various text writers one after another say that the decision in *Weedon v. Timbrell* is much shaken, and that the general opinion is against it. As an instance, Mr. Addison in his work on Torts, 2nd Ed., p. 800, and to which we were referred by Mr. Harrison, after citing *Weedon v. Timbrell* as shewing that it was formerly held that a husband voluntarily relinquishing the society of his wife

and separating from her, had no claim for damages, &c., says, citing *Chambers v. Caulfield*, "but it is now held that the separation is no bar to the husband's claim," &c.

In connection with this subject I may refer to a passage in a recent judgment of Sir Richard Malins, *In re Overend, Gurney & Co.*, (L.R. 6 Equ. 362), although the converse of the case before us. In speaking of a case of *Ex parte Lambert*, he says: "It certainly is, I must say, very remarkable that this case, completely overruled by a current of authorities extending over more than half a century, continues to be cited in all the text books—*Chitty*, *Bailey*, and even Mr. Justice Byles' book—as if it were still law, although the same books cite the authorities that have in principle completely overruled it. *Ex parte Lambert* is the case referred to for the proposition of law, which, I am bound to say, shews that it is the habit of even the best text writers to take these things for granted one after another." (a)

*Roper* on Husband and Wife, Vol. II. p. 323-4, puts the case correctly, when he says that the principle on which *Chambers v. Caulfield* is decided is, that the husband *had not* in fact wholly parted with the comfort, society, and *assistance* of his wife. Alderson, J., in *Winter v. Henn* (4 C. & C. 498) says: "I apprehend the law to be, that the plaintiff will be entitled to recover unless he has in some degree been a party to his own dishonour, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all advantage to be derived from her society. If you should be of opinion that the plaintiff has done any of these three things, then the defendant will be entitled to your verdict."

The next case in the same volume, *Calcraft v. The Earl of Harborough* (p. 499), was an action of this kind, and cited by the plaintiff on the argument; but I do not think it has any bearing upon the point we are considering.

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(a) See an article in the Law Magazine for November, 1868, on Modern Text Books, in which some remarkable errors in recent editions of standard works are pointed out.

In *Wyndham v. Lord Wycombe* (4 Esp. 17), Lord Kenyon held, as he had so held in a case of *Sturt v. Marquis of Blandford*, "that if the husband openly violated all those rules of conduct which decency required and affection exacted from him, \* \* so as to create disgust or unhappiness in his wife, that such a husband could not come into a court of justice for damages, or complain of the loss of the society of a wife which he never courted or enjoyed; and that, of course, such conduct on the part of the husband went to the ground of the action."

*Bromley v. Wallace* (4 Esp. 237), was cited as shewing that Lord Alvanley dissented from the doctrine laid down by Lord Kenyon, but upon an examination of what Lord Alvanley is reported to have said in connection with the facts of this case, it does not conflict with the general principle contended for by the defendant.

In *Harvey v. Watson* (7 M. & G. 644), already referred to, the full court after argument allowed a plea of this nature, Tindal, C. J., in giving judgment saying, "I do not say that the plea is good; but after the judgment of the Court of Queen's Bench in *Weedon v. Timbrell*, I think it would be too much to say it is so had a plea that we should not permit it to be placed on the record." There, Dowling, Sergeant, in supporting the rule said that *Weedon v. Timbrell* had never been overruled.

In the case of *McMillan v. Jelly* (17 C. P. 702), *Weedon v. Timbrell* is cited in the judgment of the court as an authority laying down in express terms that the gist of the action is the loss of the comfort and society of the wife; *Chambers v. Caulfield* being also referred to. If that is the principle, and the law seems to be well established, for no decided authority can be found conflicting with it, such being the case, I cannot see upon what ground the matter contained in this plea is not a good answer.

It was contended for the plaintiff that, assuming there is no loss of comfort and society, notwithstanding what is stated in the plea, that there is some imaginary injury to the feelings suffered by the husband to be recompensed in

damages. Whatever this may be, I cannot concur in holding that it is the ground of this action. I prefer adopting the law and the common sense view of Lord Kenyon. It may in cases where a cause of action does exist be a subject to be taken into account in estimating damages, but under the circumstances disclosed in this plea it must be purely supposititious. I cannot admit that a husband who has outraged the decencies of life, cruelly treated his wife, compelling her under threats of her life to live apart and to seek a refuge where she might, and thus rendering her accessible to temptation, is entitled to seek in a court of justice damages for some suggested injury to his feelings, because a wife so treated and abandoned has departed from the path of moral rectitude.

On the whole, while I cannot say that the law is well settled, I am not prepared to overrule the judgment of the Court of Queen's Bench in *Weedon v. Timbrell*, and my judgment is in favour of the defendant, leaving it to the plaintiff, if he thinks proper, to take the opinion of a higher tribunal on the question raised.

The learned Chief Justice desired me to say that he concurred in this judgment, being of opinion that the weight of judicial authority is in its favor. At the same time he also wished me to add, that in a Court of Appeal he might on further consideration arrive at a different conclusion.

ADAM WILSON, J.—The pleas allege the following circumstances in bar of the action :

1. That the plaintiff had been guilty of adultery with a particular woman, by whom he had a child, which was living with the plaintiff.

2. That he had continually treated his wife with intolerable cruelty, and had frequently used personal violence towards her.

3. That he put her away from him by force, and threatened to put her to death if ever she returned to him ; so that she was in danger of her life.

4. And that she did live apart from him permanently.



In the third plea, that while the plaintiff's wife was living separate from him as aforesaid, on account of his adultery and cruelty as aforesaid, she applied for and obtained an order for protection, according to the statute, after the plaintiff had received due notice of the application, which order was duly registered and is still in force, by reason whereof the plaintiff has lost all claim to the comfort and society of his wife.

The declaration does not enable any one to say whether it is in trespass or case. Both pleas, however, are pleaded to the pretended trespass. We may therefore treat this as both parties have treated it, as an action of trespass, whatever difference that may make.

It was strongly maintained for the defendant that the pleas were in bar of the action, and for the plaintiff that they affected the damages only, and not the right.

The case of *Weedon v. Timbrell* was most relied on by the defendant. There the plaintiff and his wife had agreed to live separately. The cause of action arose after the separation, and Lord Kenyon ruled that as the gist of the action was the loss of the comfort and society of the wife, and there was no evidence of adultery till after the separation, there was no cause of action, and he non-suited the plaintiff, which ruling, after argument, was maintained.

The *nisi prius* decisions have been both ways. *Wyndham v. Wycombe* (4 Esp. 16), and *Bromley v. Wallace* (4 Esp. 237), are instances.

*Chambers v. Caulfield* does not adopt the decision come to in *Weedon v. Timbrell*. Lord Ellenborough was of opinion it did not settle that the mere fact of separation of husband and wife was such an absolute renunciation of the husband's marital rights as to preclude him from maintaining an action for the seduction of his wife.

In *Roper on Husband and Wife*, vol. II., p. 322, note (a), it is stated that Abbott, C. J., in 1824, determined that a separation by consent of husband and wife did not prevent the action being maintained; that the separation was not complete, and the wife might, notwithstanding it, still sue

for conjugal rights. He also says it is believed other *nisi prius* cases have been decided against the doctrine in *Weedon v. Timbrell*, and that the general opinion was against it.

The law is stated in *Macqueen* on Husband and Wife; *Bright* on Husband and Wife, *Selwyn's*, N. P., *Leigh's*, N. P., and in many later text books, in the same manner—that the separation of husband and wife does not prevent the husband from maintaining an action for the seduction of his wife. Greenleaf treats *Weedon v. Timbrell* as a case overruled by *Chambers v. Caulfield*.

In *Marshall v. Rutton* (8 T. R. 545), it was held, where the husband and wife lived apart by articles of separation, that the wife could not contract and be sued as a *feme sole*, although she had a separate maintenance: that it was not “in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage while it subsists, and from thence to infer rights of action and responsibilities as consequences following from such alteration of character and condition.”

In *Winter v. Henn*, (4 C. & P. 494), among other grounds on which the action might fail, it was stated by Alderson, J., that if the plaintiff had totally and permanently given up all the advantages to be derived from his wife's society, he could not recover.

This direction is plainly opposed to the case of *Weedon v. Timbrell*, which held the action barred by mere separation, although the plaintiff had not totally and permanently given up all the advantages of his wife's society; and *Harvey v. Watson*, (7 M. & G. 644), gives nearly a death blow to *Weedon v. Timbrell*.

Notwithstanding the separation the husband is liable for the acts of his wife, as for a libel published by her, though they are living permanently apart, at least if she be not living in adultery.

In *Head v. Briscoe*, (5 C. & P. 484), Tindal, C. J., said, “There is no doubt, in point of law, that a husband, so

long as the relation of husband and wife continues, is answerable to a third person for what is done by the wife ; and whether their separation be permanent or temporary it does not affect the question, unless it operates so upon the marriage as to make that civil relation cease ; for, by the law of England, you cannot bring an action against the wife without joining the husband ; and a man would be without remedy if he could not sue the husband. Upon this ground, as at present advised, I have no doubt the action is maintainable." The Court maintained this ruling, saying there was no evidence of the wife living in adultery.

The husband is liable for the maintenance of his wife, who is compelled to leave him from his misconduct, or who separates from him by his consent ; but if she subsequently commit adultery, no matter whether he compelled her to leave or consented to her leaving, the husband is no longer liable: *Govier v. Hancock*, (6 T. R. 603) ; *Atkins v. Pearce*, (2 C. B. N. S. 763) ; *Cooper v. Lloyd*, (6 C. B. N. S. 519) ; *Woodward v. Dowse*, (10 C. B. N. S. 722) ; *Bostock v. Smith*, (34 Beav. 57).

The husband may attach as a condition to a devise to the wife, that she shall enjoy it so long as she remains unmarried, for he has an interest in the viduity of his wife. I see no reason why the devise might not be subject to the condition of chastity also. . An annuity may be granted on a separation upon such a condition : *Goslin v. Clerk*, (12 C. B. N. S. 681).

If there be such an interest by the testator in the widowhood or chastity of his wife for the sake of those he leaves behind him, I do not see why the husband himself may not have an interest in the chastity of his wife while he is living, and there is a possibility or hope of their coming together again as husband and wife.

An agreement either before or after marriage providing for a future voluntary separation is against public policy and void: *Anonymous* (3 K. & J. 382) ; *Hope v. Hope* (3 Jur. N. S. 454).

Subsequent cohabitation will determine a separation

deed : *Westmeath v. Westmeath* (1 Dow & C. 519); *Lee v. Thurlow* (2 B. & C. 547).

A deed of separation is no bar to a suit for restitution of conjugal rights : *Anquez v. Anquez* (L. R. 1 P. & D. 176); *Spering v. Spering* (9 L. T. Rep. N. S. 24); *Wilson v. Wilson* (5 H. L. Cas. 40).

If the husband is still able to maintain such an action as the present, although he has separated from his wife by a voluntary agreement, or although he is separated from her by his or her unavoidable absence in a foreign country, and there is still in such cases that comfort and society sufficient to constitute a legal right for its deprivation, I do not understand how the husband can absolutely forfeit this right, by anything short of connivance or consent to his wife's adultery, by any act or misconduct of his own. The marriage has created certain rights and liabilities which neither party can change or cast off, and no man can justify himself, when living with another man's wife against her husband's consent, by setting up as an absolute bar and answer to the husband's complaint that the law can give him no redress because he has totally and permanently given up her society.

The law presumes that cohabitation disturbed may be resumed, and it affords a remedy for bringing it about; but how can this be accomplished if any man is at liberty to carry on an adulterous intercourse with the wife with impunity. His interference renders reconciliation impossible. The husband's loss of his wife's society is made perpetual by the defendant's interference.

It may happen, too, that the separation has been brought about by the wife's misconduct or cruelty. There the comfort and society of the wife has been effectually and permanently lost to the husband, yet it has never been said that the husband cannot maintain an action against any one who has improper intercourse with his wife under these circumstances.

What more of comfort and society of the wife has the husband lost in this last case, than when he is the active cause of the separation ?



It is true he is to blame for the separation in the one case, but not in the other; but how can his general misconduct, not connected in any manner with the particular cause of action against the defendant, be set up as a bar to that particular wrong or injury?

Connivance amounting to a general license on the part of the husband, or an express license given by him to do the particular wrong complained of, is a direct answer to an action for that supposed wrong. I am not aware of any legal or logical bar or answer, besides this, which can be pleaded or made in such a case.

"The old law," it is said, in 3 *Bl. Com.* 139, "was so strict in this point, that, if one's wife missed her way upon the road it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned; but a stranger might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce." The defendant does not consider himself bound by the old law. Its limits are too restricted, no doubt; but I think the true limits are not so expansive as the defendant contends for.

In my opinion the pleas in question do not constitute a sufficient defence in substance to the action.

I do not feel sure the pleas state a sufficient case against the plaintiff.

The adultery of the plaintiff in the second plea mentioned is not alleged to have been since his marriage, and for anything that appears in it it may all have happened many years before it. His having the child of his illicit connection living with him is not a serious matter, and it is the child, not the mother of the child, the plea states to be now living with the plaintiff.

The statement that the plaintiff had continually treated his wife with intolerable cruelty is a flourish amounting to very little, so long as no case of cruelty is set forth; and that the plaintiff frequently used personal violence towards her is not sufficient, unless it was of that character which endangered her health or safety, which is not shewn.

The putting his wife away from him by force, and threatening to put her to death if she ever returned, so that she was in danger of her life, may be a sufficient allegation of cruelty to have justified her in leaving him, for it states as a fact that she was in danger of her life, and so she lived apart from him; and this may be sufficient, although it is not alleged she had any actual fear or apprehension that he would carry out what he had threatened, for if she was in danger of her life she had the fear of actual violence being committed.

This is the only part of the statement which in my opinion could have justified her in leaving him: *Milford v. Milford*, L. R. 1 P. & D. 295; *Cousen v. Cousen*, 4 Sw. & Tr. 164; *Brown v. Brown*, 14 W. R. 318, Div.

In my opinion the pleas are not sufficient in law, and the judgment should be for the plaintiff on demurrer.

*Judgment for defendant.*

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### JACKSON V. HYDE.

#### *Negligence—Evidence of—New trial.*

In an action for negligence, where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury.

In an action against a surgeon for malpractice in amputating an arm above, instead of below the elbow, several medical men of repute approved of the defendant's course. The jury having nevertheless found for the plaintiff, a new trial was granted without costs.

ACTION against a surgeon, for negligence, in amputating the arm of the plaintiff above the elbow.

*Plea*—Not guilty.

The case was tried at the last Fall assizes for the County of York, before Morrison, J.

The plaintiff contended that the amputation should have been below the elbow, and this was the negligence complained of.

The plaintiff's witnesses, including medical men, swore

that the operation should have been above, while on the defendant's side, several medical men of the highest reputation approved thoroughly of the defendant's course.

The case was left to the jury, who found for the plaintiff with \$250 damages—defendant's counsel objecting that there was no evidence to support the action.

*Anderson*, for the defendant, obtained a rule calling on the plaintiff to shew cause why a new trial should not be granted, for the misdirection of the learned Judge in ruling there was any evidence of negligence to be left to the jury, and because the verdict was against law and evidence.

In Hilary Term last, *Harrison*, Q. C., shewed cause, citing *Hawkins v. Alder*, 18 C. B. 640; *Regina v. Chubbs*, 14 C. P. 32.

*Anderson* supported the rule.

ADAM WILSON, J., delivered the judgment of the court.

This case is one of a class from which negligence cannot be assumed against the defendant from the mere act done to or from the injury suffered by the plaintiff, without some affirmative evidence on the part of the plaintiff to establish a *prima facie* cause of action.

The plaintiff's hand was very seriously injured, and the evidence shews that amputation was necessary. The real question in controversy at the trial was whether the operation should have been performed above or below the elbow.

The medical evidence most plainly shewed that the defendant had not acted "in an ignorant, unskilful, negligent, and improper manner," according to the language of the declaration.

The evidence certainly left the case, putting it most favorably for the plaintiff, in that condition in which it was as consistent with the absence as with the existence of negligence in the defendant, upon which it is held the plaintiff has failed; and this rule is said to be of the first importance, and to be fully established in all the courts: *Cotton v. Wood* (8 C. B. N. S. 568).

In actions for malicious prosecution, or for maliciously arresting another, it is always the rule that the defendant has exculpated himself if he has fairly and fully stated all the facts to the magistrate, or to his professional adviser, or to some other competent person to act and advise in such a case, and he has been governed by their direction or advice.

Suppose, in this case, the defendant, before removing the plaintiff's arm, had called a consultation of the medical men who afterwards bore testimony in his favor, and had fairly and fully submitted to them all the facts of the case, or had exhibited to them the arm of his patient, and they approved of the amputation above the elbow, could it then have been said that the defendant in carrying out their recommendation had acted ignorantly, unskillfully, negligently, and improperly? The mere statement of the proposition prompts the answer that should be given to it.

In what manner does this after justificatory and approving evidence of what had been done, differ from the prior advice and recommendation to do the same act and in the same manner.

It is notorious there are many cases in which jurors are not the most dispassionate or most competent persons to try the rights of parties, and an action of this kind comes within the class to which I have alluded. In such actions the Judge should firmly assume the responsibility of determining himself whether sufficient evidence has or has not been given to compel him to leave the case to the jury.

We think the rule must be absolute for a new trial without costs.

We are aware of the great nicety there is in attempting to lay down general principles for all cases, but we see no difficulty in applying them to each case of this nature as it arises.

*Rule absolute.*

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## IN RE COLEMAN V. KERR.

*Replevin—Costs.*

*Held*, affirming Ashton v. McMillan, 3 P. R. 10, that in replevin full costs are not taxable without a certificate.

At the trial in the County Court a verdict was entered for defendant, with leave reserved to move to enter it for the plaintiff, and no certificate was applied for. On appeal a verdict was directed for the plaintiff for 15s., and the Clerk of the County Court taxed only Division Court costs. The Judge refused a revision, and this court would not interfere.

During last Michaelmas Term *C. S. Patterson* obtained a rule calling on the learned Judge of the County Court of Hastings, and John Kerr to shew cause why a writ of *mandamus* should not issue, commanding the Judge to grant to the plaintiff in a suit in his court where one Coleman was plaintiff and Kerr defendant, a summons calling on the said Kerr to shew cause why the taxation of costs in that suit should not be reviewed, and costs allowed to Coleman on the scale of full County Court costs; and why, in case it was shewn to him that the goods replevied were of the value of upwards of \$40, he should not make an order for such revision of taxation and allowance of costs, on the ground that the Division Court had no jurisdiction in the case.

It appeared that in the case of *Coleman v. Kerr* the plaintiff brought replevin to try the right of the collector to seize the goods in question to satisfy a demand for taxes: that at the trial a verdict was rendered for the defendant, with leave to the plaintiff to move to enter a verdict for him: that no certificate was moved for at the trial, contingent on the verdict being entered for the plaintiff: that in the following term the verdict was moved against and a rule *nisi* granted: that it was after argument discharged: that against that decision the plaintiff appealed to this court: that the appeal was allowed, and a rule absolute to enter a verdict for the plaintiff ordered: that in pursuance thereof a rule issued in the court below, ordering the verdict to be entered for the plaintiff, with 15s. damages: that on entering judgment the clerk of the County Court would only tax to the plaintiff Division Court costs, which

he did at \$3.50 : that the plaintiff's attorney applied to the Judge for a summons in order to revise the taxation, and to tax to the plaintiff County Court costs : that the learned Judge was of opinion (which he expressed in writing) that —on the authority of the case of *Ashton v. McMillan* (3 P. R. 10)—the same certificate was required in replevin as in other cases; and he declined to interfere.

During this term *Harrison*, Q. C., shewed cause. He contended that the judgment was right, on the authority of the case relied upon : that at all events, the Judge having exercised his discretion, this court would not interfere by *mandamus* with a view to a particular decision : *Regina v. Lord of the Manor of Old Hall*, 10 A. & E. 248 ; *Regina v. The Lords of the Treasury*, Ib. 374 ; *Ex parte Smyth*, 3 A. & E. 722 ; *Sturgis v. Joy*, 2 E. & B. 739 ; *Regina v. Law*, 7 E. & B. 366 ; *Regina v. Dayman*, Ib. 672 ; especially where costs and a point of practice only were involved : *Carr. v. Stringer*, E. B. & E. 123 ; *Woods v. Rennett*, 12 U. C. R. 167 ; and where judgment had been entered : *Williamson v. Bryans*, 12 C. P. 276.

*C. S. Patterson* supported the rule.

MORRISON, J., delivered the judgment of the court.

The principal question raised on this rule, and which is one of practice, is whether in an action of replevin in a County Court, where the damages assessed are under \$40, and no certificate is granted or moved for at the trial, and the taxing officer refuses to tax the costs on the higher scale, is the plaintiff entitled to obtain an order from the County Court Judge to enable him to tax full costs, on shewing that the cause of action was one not within the jurisdiction of the Division Court.

The case of *Ashton v. McMillan* (3 P. R. 10), upon which the learned Judge below acted, was a decision of the full court upon a reference from Chambers ; and Sir John Robinson says, " In point of practice there is no doubt that in replevin certificates for costs are often applied for

at the trial and granted. \* \* \* We have spoken with the Judges of the other courts on this point of practice, and we are of opinion that full costs should not be taxed without a certificate in cases of replevin more than in other cases, where, for all that the verdict or the determination shews, the action might as well have been brought in the lower court as in the higher."

It was argued by Mr Patterson that that was a wrong decision ; but be that as it may, it was a decision after the passing of the act giving jurisdiction to the Division Courts in replevin, and unless we see that the rule has a prejudicial effect, or is contrary to some statute, there is no reason why it should be departed from. It was a rule settled by all the judges for the guidance of the profession, and if parties omit following it they must take the consequences.

It is true, as was argued, that the damages in replevin are generally nominal, but that is no good reason why a certificate should not be moved for at the trial. The affidavit upon which the writ issued shewing the sworn value of the goods, or the bond taken by the sheriff, as suggested, are no certain criteria of the plaintiff's right to proceed in the higher jurisdiction. It may turn out on the trial that the plaintiff is only entitled to recover in respect of a trifling portion of the goods, in value less than \$40 : *Haggart v. Kernahan* (17 U. C. R. 341). The plaintiff is nevertheless entitled to have his verdict for nominal damages. If the plaintiff's contention is right, although the plaintiff only recover in respect of goods of the value of \$5, yet as the writ of replevin could not issue from the Division Court because he replevied goods to the value of \$50, he is entitled to prosecute his suit in the county court. That he may do so we admit, but we see no reason why he is entitled to full costs. At all events it was for the Judge who tried the cause to say whether it was a case for a certificate.

It was also argued that replevin suits were not suits contemplated by the 328th section of the Common Law Procedure Act. The case of *Ashton v. McMillan* settles

the point as to County Courts, and the 23 Vic. ch. 45, sec. 6, gives the Division Court jurisdiction just as as if the 1st sub-section of the 55th section of the Division Courts Act had inserted in it after the word "claimed" the words "or in replevin where the value of the goods," &c., "taken does not exceed \$40." Consequently there may be a suit in replevin of the competence of the Division Court, and the 328th section of the Common Law Procedure Act applies, and in that case the rule laid down in *Ashton v. McMillan*, as well as the general rule in *Bonter v. Pretty* (9 C. P. 273), takes effect. In the latter case Draper, C. J., in giving judgment says: "Ever since the case of *Gardner v. Goddard* (Dra. Rep. 101), it has been settled that the amount of the verdict must be held *prima facie* at least to settle the question of jurisdiction, and if under any circumstances the inferior court could have tried the action, for the sum of which the verdict is rendered, its jurisdiction will be assumed, and the plaintiff must get a certificate to entitle him to full costs. I do not think we are at liberty now to try upon affidavit the question of jurisdiction, or rather whether on the facts sworn to the Judge at the trial might properly, or would probably, have given the certificate. The question is, looking at the amount of the verdict, was a certificate necessary? In my opinion it was, and it could not be legally granted on an application made for the first time three months after the trial."

By refusing this application we are not establishing any new rule; for in cases of replevin we understand it is the practice (I know it has been so in trials before myself) that the plaintiff gives evidence, or in some way satisfies the presiding Judge, that the case is one not within the competence of the inferior court, and applies for the certificate.

We are of opinion that this rule should be discharged.

*Rule discharged.*

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## FAHEY V. KENNEDY.

*Maliciously suing out attachment—Declaration—Pleading.*

Declaration, that one O. caused an attachment to issue against the plaintiff as an absconding debtor, and that defendant, in order to enable him to obtain an order for such attachment, falsely, maliciously, and without reasonable or probable cause, made a false affidavit that he had good reason to believe, and did believe, that the plaintiff had departed from Upper Canada, with intent, &c. It was objected, in arrest of judgment, that there was no averment that the attachment had been set aside, nor that the defendant had no reasonable cause for making the affidavit, or for his belief; but

*Held*, that the first averment was unnecessary, and that the other was sufficiently made, after verdict.

THE declaration stated that Patrick O'Brien brought an action, in the County Court of Hastings, against Fahey, the now plaintiff, and caused a writ of attachment to issue against the personal property, credits and effects of the plaintiff as an absconding or concealed debtor, in pursuance of the Statute in that behalf, maliciously and without reasonable or probable cause: that the defendant, in order to enable O'Brien to obtain an order from the Judge of the County Court for the issuing of the attachment, falsely, maliciously, and without reasonable or probable cause, and intending to injure the plaintiff, and in collusion with O'Brien, made a false affidavit in the said cause, that he, the now defendant, had good reason to believe and did believe the now plaintiff had departed from Upper Canada, with intent to defraud O'Brien, or to avoid being arrested or served with process: whereupon O'Brien caused the said affidavit to be filed in the said court, and thereupon caused an order to issue for the said attachment, and upon it issued the attachment against the property of the now plaintiff, and delivered the same for execution to the Sheriff, who executed the same in due course of law. And the plaintiff alleged that in all the aforesaid [acts of O'Brien the defendant was in collusion with him, and was privy to all said acts, and was aiding and abetting him therein, having an interest in the claim sued for in said action,

*Plea*—Not guilty. Issue.

The cause was tried at the last Fall Assizes at Belleville, before Hagarty, J., when a verdict was rendered for the plaintiff with \$300 damages.

In Michaelmas Term last *Mackenzie*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had, on the ground that there was no evidence of the want of reasonable and probable cause; or why the judgment should not be arrested, on the grounds that it is not alleged in the declaration that the writ of attachment was superseded or set aside, and the proceedings in the County Court were determined or ended; and on the ground that it is not alleged that the defendant caused or procured any of the wrongful acts set out in the declaration to be done maliciously and without probable cause, although it is averred that the defendant was in collusion with O'Brien and privy to all his acts, and was aiding and abetting him therein; and on the ground that there is no cause of action disclosed in the declaration.

In this term *Jellett* shewed cause. He argued that the evidence was sufficient to lead to the inference of a want of probable cause, in which case the court would not interfere. As to the motion in arrest of judgment, it was not necessary to shew the proceedings had been determined in the action, for there was nothing in that suit, whatever the event of it might be, to interfere with the prosecution of this action for the defendant's malicious conduct in swearing the plaintiff was an absconding or concealed debtor, and attaching his property on that pretence: *Bishop v. Martin*, 14 U. C. R. 416. It was not necessary to aver in what respect the defendant had no reasonable or probable cause for making the affidavit, as he did not swear to the debt; he was not the creditor, he was merely one of the two persons who were required to join the plaintiff in swearing that they believed the plaintiff had absconded or was concealed: *Pasley v. Freeman*, 2 Sm. Lea. Cas. 71, 5th Ed. Judgment will not be arrested if the defect is amendable, and an amendment can be made

in this respect if thought necessary: *Elliott v. Croker*, 8 U. C. R. 156; *Deady v. Goodenough*, 5 C. P. 163; *Martin v. Wilber*, 9 C. P. 75; *Wilkinson v. Sharland*, 11 Ex. 33; *Oxley v. James*, 13 M. & W. 215.

*Mackenzie*, Q. C., contra, referred to the following cases as shewing that if the party told all he knew fully to the magistrate or attorney on whose advice he acted, this rebuts malice and establishes reasonable and probable cause: *Crawford v. McLaren*, 9 C. P. 215; *Fellowes v. Hutchison*, 12 U. C. R. 633; *Ravenga v. McIntosh*, 2 B. & C. 697. An amendment should not be allowed: *Atkinson v. Raleigh*, 3 Q. B. 79. The declaration is clearly insufficient, for the objections taken in the rule: *Manning v. Rossin*, 3 C. P. 89; *Whitworth v. Hall*, 2 B. & Ad. 695; *Matthews v. Dickinson*, 7 Taunt. 399; *Basébé v. Matthews*, L. R. 2 C. P. 684; *Bishop v. Martin*, 14 U. C. R. 416; *Parton v. Hill*, 10 L. T. Rep. N. S. 414; *Carroll v. Potter*, 1 E. & A. 357; *Gilding v. Eyre*, 10 C. B. N. S. 592.

ADAM WILSON, J., delivered the judgment of the court.

We do not think the suit can be reopened on the merits. The cause was for the jury and was fairly tried, and the result was warranted by the evidence.

As to the legal question, there is no doubt that any suit or prosecution, or proceeding, alleged to have been commenced, carried on or taken maliciously, and without reasonable or probable cause, must be determined and alleged to have been determined in favour of the party alleging such malice, before he can maintain an action for the malicious proceeding. Byles, J., said in *Basébé v. Matthews* (L. R. 2 C. P. 687), "This doctrine is as old as the case of *Vanderberg v. Blake* (Hardr. 194), where Hale, C. J., said, "If such an action should be allowed," that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court, "the judgment would be blowed off by a side wind, and every action would have to be tried over again upon the merits."

Where the ground of action is for maliciously and without reasonable or probable cause suing out process and arresting the person, or attaching the estate of the alleged debtor, without having any reasonable or probable cause to believe that the debtor was about to leave the province, or had absconded or was concealed in the province, to avoid arrest or service of process, in order to defraud his creditors, it is also quite clear that the action will lie for such malicious conduct, without regard to the pending or previous suit, "because in such cases the existence of the debt sworn to is not disputed": Per Robinson, C. J., in *Bishop v. Martin* (14 U. C. R. 418.) See also *Gilding v. Eyre* (10 C. B. N. S. 592.)

If this declaration shews that the cause of action is dependent on the result of the action in which the malicious prosecution is said to have been taken, then it must shew the successful termination of such suit in favour of the present plaintiff, as a condition precedent to the bringing of this action; but if the complaint disclosed be in no way dependent on the result of the present suit, and it is a well grounded complaint, however the event may be, the plaintiff must be able to maintain his action without stating the determination of the first suit.

This action professes to be founded on the last stated proposition, for it is an action brought against not the creditor or plaintiff in the first suit, but against one of the two deponents required by statute to make affidavit with the creditor, who swore he had good reason to believe, and did believe, that the said plaintiff had departed from the province with intent to defraud the plaintiff, or to avoid being arrested or served with process; and because it is alleged the now defendant made this affidavit maliciously, and without reasonable or probable cause for believing that which he swore to be true.

It was not, therefore, necessary to have averred the determination of the previous suit, if this ground and cause of action has been properly pleaded.

The real question then is, whether the declaration discloses a cause of action well set forth.



The declaration alleges that the defendant, in order to enable O'Brien to obtain an order for the writ of attachment, "falsely, maliciously, and without reasonable or probable cause, made a false affidavit that he had good reason to believe, and did believe, the plaintiff had departed from Upper Canada with intent," &c. And the defendant contends that this is an insufficient allegation, and that the declaration should further have averred that "whereas the defendant had no reasonable or probable cause for making the said affidavit, or for believing that the plaintiff had departed," &c.

Should the latter allegation, or something of the same import, have been set out, or does the declaration sufficiently contain or imply this averment?

It is necessary that the different acts done by the defendant should be alleged to have been done maliciously, &c., against the plaintiff, as that the defendant maliciously, &c., made information on oath against the plaintiff, and maliciously, &c., caused the plaintiff to be brought before a magistrate, &c., as in *Stewart v. Gromett* (7 C. B. N. S. 191), and many other cases.

In the precedents in *Bullen* and *Leake*, 2nd ed. 305, 307,—the former for arresting on a *capias* obtained on the creditor's affidavit on the malicious pretence that the plaintiff was about to quit England, and the latter for maliciously filing a petition for adjudication in bankruptcy—there is no such averment as that the defendant had no reasonable cause for believing that which he swore to to be true. The forms merely state, in the first case, that the defendant maliciously, &c., procured from a judge a special order directing the plaintiff to be held to bail, by then falsely and maliciously representing to the judge by a false affidavit that the plaintiff was then about to quit England. This is in substance the like form of the other precedents, but they each contain an allegation of the termination of the proceedings—in the precedent as to quitting England, that the plaintiff applied to be discharged from custody because he was not about to quit England, and that the order for his

discharge was made on that ground, and in the other cases that the proceedings were set aside.

In *Whitworth v. Hall* (2 B. & Ad. 695), Parke, J., said, "It seems to be involved in the proposition, that the commission was sued out without reasonable and probable cause, that such commission must be superseded before the action be commenced, for the very existence of the commission would be some evidence of probable cause."

Shewing the proceeding to have resulted successfully in favour of the plaintiff who sues for the malicious proceeding, is evidence of a want of probable cause: *Morgan v. Hughes*, 2 T. R. 225).

*Craig v. Hasell*, (4 Q. B. 481), contains an allegation that whereas the debt was not in danger of being lost, as the defendant well knew.

It must undoubtedly appear on the declaration that there was a want of probable cause. The unsuccessful termination of the proceedings complained of, the delay in prosecuting or the abandonment of proceedings, the arresting on a *Ca. Sa.* for more than the party knew was owing—all shew *primâ facie* a want of probable cause.

But falsely and maliciously *making an affidavit* that the plaintiff was about to depart from the Province, does not properly allege that the statements in the affidavit were made maliciously.

The allegation in this case that the defendant falsely and maliciously and without reasonable or probable cause made a false affidavit, may however be held, as was done in *Daniels v. Fielding* (16 M. & W. 200), after verdict, to mean that the statements in the affidavit were false, which statements are here set out in the record.

We think the declaration may be held now to be sufficient.

*Rule discharged.*

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## JACKSON AND WIFE V. YEOMANS.

*Mortgage—Absence of covenant to pay—Liability.*

Where the mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage; there must be evidence given of a loan or debt.

A mere promise to pay such money in consideration of forbearance to sue would not be binding, though if in consideration of forbearing to sell or eject it would be:

*Held*, however, that in this case the evidence of such latter promise, set out below, was unsatisfactory; and the jury having found for the plaintiff, a new trial was granted.

THE first count of the declaration set out that defendant bargained and sold to Sarah, the wife of the other plaintiff, 16 acres of land, with a proviso for making the mortgage void if the defendant should\* pay to Sarah \$5400 in manner following: \$400 within 24 hours after the result of a crushing of rock from a shaft upon the said land should be ascertained, which sum had been paid, the further sum of \$1000 within three months from the date of the mortgage, and the balance, \$4000, in three regular equal payments, in six, nine, and twelve months from the date of the mortgage. Averment—that on the 9th June, 1868, \$1000 was due, and the defendant, in consideration that the plaintiff would give day of payment to the defendant for payment thereof for the period of two months, then promised the said Sarah, &c., to pay the said sum of \$1000 and interest thereon from the date of the mortgage: that the plaintiff gave day of payment for the sum for the term so agreed on, and all things happened, &c., yet defendant did not pay the same.

Common counts for lands sold and conveyed, money lent, &c., and for interest and account stated.

*Pleas* to both counts, never indebted, and payment.

At the trial, at Belleville, before Hagarty, J., the plaintiffs put in and proved the mortgage, dated 23rd January, 1868, made by the defendant to the plaintiffs, which conveyed to them certain lands. Proviso—this mortgage to be void on payment of \$5400, the sum of \$400 within 24

hours after the result of a crushing of rock from the shaft upon said land is ascertained, such crushing to take place as soon after twelve days from the date of this mortgage as a mill can be procured to do the same; the further sum of \$1000 within three months from the date of this mortgage; and the balance of the above sum, being \$4000, in three equal payments, to be respectively made in six, nine, and twelve months from the date of these presents. It contained no covenant for payment, that covenant being struck out by the pen. The mortgage was a printed form, and made under the act respecting short forms of mortgages; it contained the proviso for reentry and sale by the plaintiffs in default of payment. The \$400 was paid on the 13th February, 1868, and endorsed on the mortgage.

A witness was called, who said he was present when the mortgage was executed, and he said that the defendant told him, both before and after the mortgage was signed, that he was to pay \$400 if he got eight or ten days to mine on the land, and that he said to witness that if he paid the \$400, you may depend on the balance.

A witness named Orr said that he went to defendant about the 9th June, 1868, and told him that he (Orr) had been speaking to the plaintiff about selling to the plaintiff his farm, and that the plaintiff told witness he had an obligation against the defendant, \$1000 due the rest coming due inside a year: that defendant said to him he was not prepared to pay them: that the plaintiffs made a special bargain with him to wait two months from the time they had been with him, the defendant, and that he would then be prepared to pay them, and the witness said he understood defendant referred to the \$1000 due. On the same day he said defendant asked the witness if he had seen Dean & Gilbert (attorneys), and told witness he had better see them, and that he saw Gilbert, and told him defendant had referred the witness to them.

The plaintiff having closed his case,

*Bell*, Q. C., objected that there was no evidence to go to the jury of personal responsibility, &c. The learned Judge



was of opinion he must leave the case to the jury on the testimony of Orr.

The defendant then called Mr Gilbert, of the firm of Dean & Gilbert, who proved that the plaintiff and Orr came to him on the 10th June, and said the plaintiff had been to defendant, that he (Orr) was about making a bargain with the plaintiff, and asked what shape the mortgage was in. This witness saw the mortgage executed. He said the land was only intended to be bound: that the plaintiff came several times to them, as acting for defendant, to get defendant's note for the \$1,000, which defendant refused; on the same day spoken of by Orr, plaintiff told witness he had seen defendant with Orr to try and get the \$1,000 from him; that defendant refused, and that he (plaintiff) was going out to take possession of the land; some days after this, the plaintiff told witness he had done so, and locked up the shaft; the plaintiff was still in possession.

W. W. Dean, partner of the last witness, heard the plaintiff say to defendant, after the middle of June, he did not mind waiting if defendant would assume the thing; defendant refused, saying he would not pay another dollar till the thing was further developed.

The learned Judge told the jury that he saw nothing to leave to them, except whether after the mortgage was executed defendant promised, in consideration of two months extra time and forbearance, to pay \$1,000 personally; and he reserved leave to the defendant to move to enter a non-suit on the whole case, should the jury find for the plaintiffs; and he also reserved leave to the plaintiffs to move to increase their verdict by the amount of the second instalment then due, if the court should think that the plaintiffs were entitled to recover on the money counts on the face of the mortgage as a matter of legal construction—the real contest at the trial being whether the defendant ever was to be personally liable or only the land.

The jury found for the plaintiff \$1,000.

During last Michaelmas Term *Wallbridge*, Q. C., obtained a rule *nisi*, in pursuance of the leave reserved, to increase the verdict by the sum of \$1,333.33 and \$26.00 interest; and *Moss*, for the defendant, obtained a rule to shew cause why the verdict should not be set aside and a non-suit entered, on the ground that the promise laid in the first count was not proved; that there was no evidence of any consideration for the promise, and no evidence to support the common counts; or why a new trial should not be had, on the ground of the verdict being against law and evidence and the weight of evidence.

During this term both rules were argued.

*Wallbridge*, Q. C., for the plaintiffs.

*Bell*, Q. C., (of Belleville) and *Moss*, contra, cited *Hall v. Morley*, 8 U. C. R. 584; *Pearman v. Hyland*, 22 U. C. R. 202; *Carscallen v. Shore*, 17 C. P. 497; *Yates v. Aston*, 4 Q. B. 182; *Seddon v. Senate*, 13 East, 63; *Courtney v. Taylor*, 6 M. & G. 851; *Tomles v. Chandler*, 2 Lev. 116; *Bourn v. Mason*, 3 Keble 454; *Martin v. Woods*, R. & H. Dig. 143; *Ketchum v. Smith*, 20 U. C. R. 314; *Sparling v. Savage*, 25 U. C. R. 259; *Casey v. McCall*, 19 C. P. 90; *Hunt v. Swain*, 1 Lev. 165; *Jones v. Ashburnham*, 4 East, 455; *Edwards v. Baugh*, 11 M. & W. 641.

MORRISON, J., delivered the judgment of the court.

As to the question raised upon the plaintiff's rule to increase the verdict, we are of opinion that it must be discharged, upon the authority of *Hall v. Morley* (8 U. C. R. 584), followed by *Pearman v. Hyland* (22 U. C. R. 202).

*Hall v. Morley* decides that where the proviso in a mortgage is a mere defeazance, that if the mortgagor pay the money by a certain day he shall have back his land, but there is no covenant to pay the money, and where no evidence is given of a loan or debt, an action of debt will not lie. These cases are decisions against the plaintiffs' recovery upon the money counts on mere proof of the execution of the mortgage, which was all that was done here, so far as the second instalment of \$1000 is con-

cerned, and by which amount the verdict is sought to be increased.

Then as to the defendant's rule to enter a non-suit, the question that presents itself is, whether the assumpsit set out in the first count is proved; if not, the plaintiffs fail in this action. That count states that the defendant, in consideration that the plaintiffs would give day of payment to the defendant for the payment of \$1000 for two months, (which sum was recited as being due on the mortgage in the count mentioned), promised the plaintiff to pay the said sum of \$1000 and interest from the date of the mortgage. It is not said in words that the \$1000 was a debt due by the defendant; but assuming that is the substance of the allegation, it was necessary to prove a mortgage to support the count, shewing the preceding liability of the defendant as a foundation for the defendant's promise; and as the deed put in contained no covenant by the defendant to pay the \$1000, and as the cases cited shew that on the mortgage alone no action would lie to recover the moneys mentioned in the defeazance, consequently the defendant's promise was made without any consideration, a *nudum pactum*, and the count so framed was not sustained by the evidence. A promise can give no original right of action if the obligation on which it is founded never could have been enforced at law: *Wennall v. Adney* (3 B. & P. 252.)

If a party gives time to another to pay a debt for which the latter is not liable, the mere consideration of forbearance is not sufficient to make him liable for the debt: *Longridge v. Dorville* (5 B. & Al. 122, per Holroyd, J.)

But assuming that the count is sufficient to meet a case of forbearance on the part of the plaintiffs not to enforce their rights under the proviso in the mortgage,—viz., the right of selling, &c., or to bring ejectment—for two months, the defendant promised, &c., and the jury were satisfied from the testimony such was the agreement and promise, the mortgage would have shewn a good consideration for that promise, for in that case there would have been an advantage to the defendant as well as a detriment to the plaintiff.

In this last view we have to see whether the evidence at the trial was sufficient to entitle the plaintiffs to recover. The testimony as to forbearance and time is very vague, viz., that the defendant said the plaintiffs made a special bargain with him to wait two months from the time they had been with him; when that was, does not appear. Assuming that the two months was from the time the \$1000 was payable by the mortgage, then they would end on the 23rd of June; but the evidence shews that the plaintiff took possession of the place and locked up the mine immediately after the 10th June, and continued in possession at the time of the trial.

The contention of the plaintiffs at the trial appears rather to have proceeded on the ground, as indeed it was contended in the argument, that the mortgage *per se* was evidence of a debt from defendant to the plaintiffs.

On the whole, as the case is very unsatisfactory to fix the defendant with a personal liability of \$1000, and as it is not clear upon what ground it went off at *Nisi Prius*, we think there should be a new trial, costs of the first trial to be costs in the cause to the successful party in the action.

*Rule accordingly.*

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### FISHER v. GRACE.

*Dower—Assignment of—Assent to irregular assignment—Teste of writ.*

A writ of assignment of dower is a writ of execution, within the 249th section of the C. L. P. Act, and may therefore be tested on the day on which it is issued.

An assignment of dower by the Sheriff must be by metes and bounds. Where two lots fronted on a river and were therefore irregular in shape, and the Sheriff assigned the east third of one and the west third of the other, making no survey and giving no further description, the assignment was held insufficient.

But neither livery of seisin nor writing are necessary to an assignment; and where the tenant of the freehold, after such assignment, gave notice to the demandant to make her share of the fence between those portions which had been assigned by the Sheriff as her dower in the said lots and the defendant's portion: *Held*, that this was evidence of an assent by him to the assignment as made, which was therefore sufficient.

TRESPASS to the east third part of lot 5, and the west



third part of lot 6, in the first concession, western division of Colborne, in the county of Huron.

Pleas, not guilty, and land not the plaintiff's.—Issue.

The cause was tried at the Spring Assizes of 1866, before Richards, C. J., at Goderich.

The plaintiff's title was as tenant of one Mary Henley, who on the 31st January, 1861, recovered judgment in dower against this defendant, and issued a writ of assignment of dower, tested on the same day, which the Sheriff assumed to execute on the 15th February, 1861, by going upon the land and there giving possession to the plaintiff's attorney of the east third of lot five and the west third of lot six. He made no survey, however, and staked out no land, and in his evidence he said that it would require a regular survey and plan to ascertain the land assigned, as the lots had a broken front upon the river. His return endorsed upon the writ was as follows: "By virtue of the within writ to me directed, I did, on the 15th day of February, A. D. 1861, cause to be assigned to the within named Mary Henley the easterly one-third of lot number five in the first concession of the western division of the township of Colborne, and the westerly one-third of lot number six, in the first concession of the western division of the said township, as her dower in the said lots, as within I am commanded." The answer of J. Macdonald, Sheriff, H. & B.

This action was commenced on the 17th June, 1867. On the 5th September the plaintiff had a survey made, and thus ascertained his land. The defendant had in May, 1867, removed a part of the fence separating this land from the road, which was the trespass complained of.

It was objected, 1. That the assignment of dower was invalid, not having been made by metes and bounds, and that no title therefore passed to Mrs. Henley, under whom the plaintiff claimed. 2. That the writ of assignment of dower was void, not being tested in term. Leave was reserved to move for a nonsuit on the first objection.

The plaintiff put in a notice, served on him by defendant, addressed to Mrs. Henley, and to defendant as her tenant,

dated 7th June, 1867 "that unless you make your share of the division line fences on the east and west sides of those portions of lots 5 and 6 in the first concession of Colborne, western division, assigned by the Sheriff of the then united counties of Huron and Bruce as the dower of you, the said Mary Henley, in said lots, within thirty days from the service of this notice upon you, the same will thereafter be done by me and charged against you, according to the statute in such case made and provided," &c.; and it was contended that this shewed a recognition by defendant of the assignment of dower, as having been duly made.

The jury found for the plaintiff, and \$60 damages.

In Easter Term, 1868, *Robinson*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, on the ground that the plaintiff's title to the land was not shewn, because the dower of Mary Henley, under whom the plaintiff claimed as tenant, had not been properly assigned to her by the Sheriff or otherwise, and the Sheriff had made no legal or sufficient return to the writ of assignment of dower; or why a new trial should not be granted for misdirection of the learned Judge who tried the cause, in this, that he directed the jury that the plaintiff's title to the land was sufficiently shewn, whereas the writ of assignment of dower under which Mary Henley claimed was not tested in term, and was therefore void, and the dower had not been legally assigned to her, nor had the Sheriff made a legal and sufficient return to the said writ.

In this term *Mackenzie*, Q. C., shewed cause (a). The C. L. P. Act applies to proceedings in dower: *Street v. Dolsen*, 2P.R. 306. Sec. 239 makes use of the words "plaintiff or demandant," "defendant or tenant," who may be entitled to speedy execution. This being so, sec. 249, which directs that all writs of execution, excepting writs of *Ca. Sa.*, shall be tested on the day on which they are issued, is

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(a) The case was argued also in Michaelmas term, but a re-argument became necessary owing to the changes on the Bench.

an answer to the objection that the writ of dower was tested out of term.

If the teste in term time were still necessary, the writ would not be void because not tested in term; it would be irregular only, and therefore available for every purpose while it stood, and not void: *Campbell v. Cumming*, 2 Burr. 1187; *Hook v. Shipp, Andrews*, 74; *Bingham on Executions*, 188; *Tidd's Prac.*, 9th Ed., 1037. The assignment of dower having been made by the designation of the east third of lot 5 and west third of lot 6, was a sufficient description of the portion set out, although it was not done by metes and bounds or by specific measurement: *Ashborough's case*, Cro. Eliz. 17; *Howard v. Cavendish*, Cro. Jac. 621; *Draper on Dower*, 62; *Park on Dower*, 252, 270; *Booth v. Lambert*, Styles, 276; *McDonnell v. McDonald*, 24 U. C. R. 79. Lots of land are a well known recognised division of property in this province, and as such are recognised in most of our statutes. The defendant, moreover must be held to be bound by the assignment which the sheriff made, for by his notice of the 7th of June, 1867, he directed Mary Henley, and the plaintiff as her tenant, to make their share of the division fences on the east and west sides of those portions of lots 5 and 6, "assigned by the sheriff as the dower of Mary Henley in the said lots," and he cannot now be allowed to say that this assignment of dower, which had been made several years before that date, was an invalid or void proceeding. Defendant also fenced in part of this very land himself. It is just the same therefore as if he had been along with the sheriff and joined in making the assignment: *Park on Dower*, 262-3; *Consol. Stat. U. C. ch. 57*.

*Robinson, Q. C.*, contra.—If this execution be within the C. L. P. Act, the teste is correct; but it is submitted that writs of assignment of dower are not within that act. They are governed so far as it applies by the special act relating to dower, and where it does not apply by the common law practice relating to writs of that kind. A subpoena is void if tested out of term, because no change

has been made in the law relating to the teste of that particular process: *Edgell v. Curling*, 7 M. & G. 958. The writ having been tested out of term is void, and if void cannot be amended: *Macnamara* on Nullities, 24; *Kenworthy v. Peppiat*, 4 B. & Al. 288; *Nelson v. Roy*, 3 P. R. 226; *Ch. Arch. Pr.*, 12th ed., 350, 777, 1474. As to teste of writs generally, he referred also to *Regina v. School Trustees of Tyendinaga*, 3 P. R. 43; *McIntosh v. Cummings*, 1 Chamb. Rep. 68; *Helm v. Crossin*, 17 C. P. 156; Every treatise on Dower shews that the assignment must be by metes and bounds, and that no estate passes till such assignment has been made: *Draper* on Dower, 63, 64; *Park* on Dower, 262, 267, 269, 271; *Booth v. Lambert*, Styles, 276; *Washburn* on Real Property, Vol. I. p. 221-224, 234-5; *Sigler v. VanRiper*, 10 Wendell, 418; *Jackson dem. Clowes v. Vanderheyden*, 17 Johnson, 167; *Cruise* Dig. Vol. I. p. 169; *Roper* on Husband and Wife, 392-395; *Bac. Abr.* Dower, D. 2. There can be no waiver of this right: *Crabbe*, R. P. sec. 1149. 24 Vic. ch. 40, does not apply to this case, the assignment having been made before it was passed; but sec. 5 shews that under it an assignment by metes and bounds is still required. The form of writ used in the Crown Office before that act also requires it, as well as the form prepared under that statute: Rule of Court, 21 U. C. R. 582. As between grantor and grantee, that which can be made good by election of the grantee will be a valid grant: *Cummings v. McLachlan*, 16 U. C. R. 626; but that rule clearly can not be applied here. The lots in question have a broken frontage on the river, and the evidence shewed that the east third of one lot and the west third of another can constitute no certain designation, so that the sheriff can know what he has given, and the widow what she has received. It was not necessary the owner of the freehold should apply to quash the bad assignment made, as it was a nullity: *Fenny dem. Masters v. Durrant*, 1 B. & Al. 40; *Den dem. Taylor v. Lord Abingdon*, Dougl. 473; *Rowe v. Power*, 2 N. R. 1; *Sparrow v. Mattersock*, Cro. Car. 319; *Ch. Arch. Pr.*, 12th ed., 685, note k. As to the notice, the defendant was not present



at the assignment, and did not know what had been done ; he had a right to assume, as he did, that the assignment had been properly made, and there is nothing in the notice to estop him from shewing the truth, now that he is aware of it. The plaintiff had therefore no title as against the defendant ; for until a proper assignment be made no estate or title is divested out of the defendant or vested in the dowress.

ADAM WILSON, J., delivered the judgment of the court.

The case of *Street v. Dolsen* (2 P. R. 306) shews that the Common Law Procedure Act extends to proceedings in dower, so far as it can be made applicable to them. The 239th section confirms this opinion. The 222nd section, as to amendments, has been held to apply to the action of ejectment.

The 249th section, reading as follows, " Except writs of *capias ad satisfaciendum*, every writ of execution shall bear date and be tested on the day on which it is issued," &c., can be properly applied to the writ of assignment of dower ; and it is more correct that the writ should be tested on the day it issues, for it then agrees more correctly with the judgment, which takes effect on the day it is entered, having no relation to the preceding term.

The mere fact of the judgment having now no past relation, might have been found sufficient of itself to have taken away the fictitious relation and teste of the writ of assignment, so as to make the writ founded on the judgment conformable to the judgment. The *exception* of writs of *Ca. Sa.* from every other writ of execution strengthens the force of this argument, for it proves the universality of the enactment—excluding writs of *Ca. Sa.*

There is no necessity therefore to consider whether the writ would or would not have been irregular on account of the exception to it.

The questions, then, are : Was dower regularly assigned ? If not, has anything that has happened since, on the part of the defendant, established it as sufficient ?

In *Littleton*, sec. 36, tenant in dower is described to be the wife who, after the decease of her husband, is endowed

of the third part of such lands as were held by him in fee simple, &c., at any time during the coverture, to have and to hold to her in severalty, by metes and bounds, for term of her life.

In *Co. Lit.* 32, *b*, note (1) it is said: "If the sheriff doth not return by metes and bounds, it is ill unless certain closes are assigned by name. \* \* \* The heir says to the wife, I endow you of the third part of all the lands whereof your husband was seised. Ruled,—1. This is a good endowment, though not by metes and bounds, otherwise where the sheriff assigns dower. 2. This assignment shall bind the lessee, and they shall hold in common." See also *Co. Lit.* 34, *b*, note (1). "And there needeth neither livery of seisin, nor writing, to any assignment of dower, because it is due of common right?" *Co. Lit.* 35, *a*.

In the case of a wife of a tenant in common who brings a writ of dower, she cannot have any certainty of the land allowed to her by the assignment, because the precise locality of her husband's estate was uncertain: *Co. Lit.* 37, *b*. See also sec. 44.

*Booth v. Lambert* (Styles, 276) is expressly in point, that the heir may endow the widow generally of the third part of the land; and if she assent to it it is a good assignment, for by their consent they may waive the assignment by metes and bounds, which is only for their own advantage.

*Rowe v. Power* (2 N. R. 1) sets this question at rest; for the House of Lords expressly affirmed the law to be that the heir could assign to the widow one-third in general of her husband's estate, in assignment of dower.

In that case the assignment was by deed, but that does not seem to be of any consequence. In *Com. Dig.* "Dower," A. 11, this case is referred to as shewing also that neither livery nor writing are required to perfect the assignment.

There can be no doubt, then, that the tenant of the freehold could have made an assignment of dower of the east third of one lot and the west third of another lot; nor can there be any doubt that such an assignment when made by the sheriff is void, for he is compelled to assign it by

metes and bounds when the property is of that kind which may be divided in certainty.

The 24 Vic. ch. 40, does not apply here, because the right to dower was consummate by the death of the husband before the passing thereof. But, if it had applied, there is nothing in it which specially affects this case.

We do not see that in any changes of the law which have been made as to real property, the common law has been altered with respect to the assignment of dower being still valid, though it has been made without livery and without writing, if made by the tenant of the freehold.

The assignment which was made by the sheriff under the writ directed to him was invalid.

If the tenant of the freehold had been present at the time when the sheriff was executing the writ, and he directed the sheriff to give her, without admeasurement, the east third of one lot and the west third of the other lot, and she assented to this in full of her dower, and as a due execution of the writ, we cannot but think that the assignment so made and returned would have been a good assignment.

So, if after the sheriff had assigned it as he did, we do not see why the tenant of the freehold might not have adopted and confirmed it.

The question is, has he done so? The evidence shows the sheriff made the irregular assignment in February, 1861, and that the widow has been in possession from that time, by herself or her tenants, of the parts which the sheriff professed to give to her, and with the knowledge of the defendant, who has treated her as tenant in dower from that time forward. And that, in June, 1867, he formally by writing notified her and her tenant to make their share of the division fence between those portions *which had been assigned by the sheriff as her dower in the said lots* and the defendant's portion of them.

This was evidence of an assent by him to the assignment which the sheriff had made under the judgment which had been recovered against himself as tenant of the freehold ;

and we think that such an assent must be equivalent to an assignment made in the like manner by himself.

The widow does not, therefore, hold by the mere assignment of the sheriff under the writ, but by the assignment of the sheriff made by the assent and confirmation of the defendant as tenant of the freehold, to which no writing or other ceremonial was requisite to perfect her prior inchoate title.

The rule, will, therefore, be discharged.

*Rule discharged.*

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MCDONALD V. THE GRAND TRUNK RAILWAY COMPANY  
OF CANADA.

*R. W. Co.—Conveyance by of land required for their track—Effect of.*

The Grand Trunk R. W. Co. having acquired land 90 feet wide for the construction of their line, conveyed to the plaintiff a portion going 22 feet into the embankment, which at that point was high. The plaintiff built a root house on his portion, which fell in, and defendants filled up the hole, and repaired the embankment there, for which the plaintiff brought trespass. The jury found that what defendants did was necessary for the safety of their railway. *Held*, that nevertheless they were liable; for having conveyed the land, as they had a right to do, they could not afterwards, without notice or compensation, interfere with their vendee.

*Quære*, whether they could again acquire the land under the Statute.

TRESPASS to the plaintiff's land adjoining defendants' railway track in Brampton.

*Plea*, not guilty, by Consol. Stat. C. ch. 66, sec. 83.

The cause was tried before Draper, C. J., at the last Fall Assizes at Brampton.

The plaintiff's title to the land was proved. The defendants in constructing their railway took at this particular part a width of 90 feet, which was scarcely sufficient for the purpose. After the construction of the line, upon which at this place there was a high embankment with a slope of one and a-half to one, the defendants made a deed of a part of the 90 feet, and upon which a part of the embank-



ment had been built, but which it was a blunder to convey. The embankment as originally constructed covered the 90 feet; the land which the defendants had conveyed went  $22\frac{1}{2}$  feet into the embankment, and every inch of the 90 feet was requisite for the safety of the embankment. The building of the plaintiff, a root-house or ice-house, must have been constructed in the embankment, and the embankment cut away for the purpose. The root-house caved in in the fall of 1886, and left a hole which endangered the embankment.

The jury were asked to say : 1. Was the land in question the plaintiff's under the deeds produced. 2. Did he take possession of what was conveyed to him. 3. Did the defendants commit the trespass complained of. 4. Was the trespass an act of protection and preservation necessary for the use of the railway, and without which the safety of the road and of all using it, the travelling public, was positively endangered, so that the act of trespass was an act of imperative necessity.

They found the first three questions for the plaintiff, and as to the fourth, they found the repair of the embankment was a necessary act for the public safety; but they thought the defendants should have taken steps to satisfy the plaintiff, so that they could have acted lawfully.

The verdict was then entered for the plaintiff, with leave to defendants to move to enter a verdict for them, if the Court should be of opinion that on the finding they were entitled to succeed.

In Michaelmas Term last, *McMichael* obtained a rule upon the leave reserved, calling on the plaintiff to shew cause why the verdict should not be entered for the defendants on the facts of the case, and on the finding of the jury.

*Bell*, Q.C. (of Toronto), shewed cause. The finding of the jury on the fourth question submitted to them, that the repair of the embankment was a necessary act for the public safety, will not excuse the defendants nor deprive

the plaintiff of his property and of his right to compensation for the damage which has been done to it. The defence is in effect equivalent to a plea of *extra viam*, but such a plea is not admissible in relation to private ways, and a railway is no more than a private way. There was no necessity, either, for the defendants doing the acts complained of; they could have made their road and embankment quite safe by building, as they should have done, a protecting wall: *Taylor v. Whitehead* (Dougl. 745).

The Imperial Act 5 & 6 Vic. ch. 55, sec. 14, is not a provision in force in this Province

*McMichael* supported the rule. Defendants have the right to take land under Consol. Stat. C. ch. 66; sec. 7, sub-sec. 3; sec. 9, sub-secs. 4, 9, 12; sec. 10, sub-secs. 12, 13. Sec. 11 provides as to conveyances and compensation. He referred also to *Cameron v. Ontario, Simcoe, &c., R. W. Co.*, 14 U. C. R. 612; *Detlor v. Grand Trunk R. W. Co.*, 15 U. C. R. 595; *Doe d. Hudson v. Leeds, &c., R. W. Co.*, 16 Q. B. 796.

ADAM WILSON, J., delivered the judgment of the court.

We see nothing in the constitution of the defendants as a corporation which prevented them from selling, if they chose to do so, the distance of twenty-two and a-half feet into their embankment. They did do so, and received the price of it. They cannot after that, without notice, or without any intention of taking the land as necessary for the purposes of their undertaking, or of making compensation to the owner, throw earth and gravel on the portion they had sold, even if it were necessary to have done so for the safety of those who were travelling on the railway.

They could, after such sale, have sufficiently protected their roadway and embankment by some other means than throwing earth and gravel on the plaintiff's land without his leave.

If they have made it necessary to maintain their works in some other way than by continuing or constructing an embankment on the plaintiff's land, it is entirely their own

fault, for they should not have sold the portion which they say they now so imperatively require.

Whether they can acquire it again under the statute we do not decide. It is sufficient for us to say that they were trespassers in doing the acts complained of, and that the rule must be discharged.

*Rule discharged.*

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SIMMS V. DENISON.

*Money had and received—Privity of contract.*

Defendant being the treasurer of a turf club, by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was indebted to him for advances which he had previously made :

*Held*, that the plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club.

DECLARATION on the common money counts.

Plea. Never indebted.

At the trial, before Morrison, J., at the last winter Assizes for the County of York, the following facts appeared.

The defendant was the treasurer of a club called the "Toronto Turf Club." What the constitution of the club was or how it was formed did not appear. Under the auspices of this club races called the Carleton races were run in 1863. The defendant received subscriptions from members and the public as such treasurer, which subscriptions formed part of a fund out of which the purses run for were to be paid. The plaintiff entered horses for the races, and with them won two purses, one purse being over \$300 and the other over \$100. A meeting was held at the Globe Hotel, in Toronto, at which members of the club were present, and other parties interested in the races, the plaintiff being present as well as the defendant. The object of the meeting was to settle the amount to be paid

to the winners and for the purpose of paying such amounts. On that occasion the defendant explained that there were then no funds to pay the purses, stating that the club was indebted to him for advances previously made by him, and which the club promised to pay, and that he had appropriated out of the moneys paid in—*i. e.*, funds of the club—\$600 to pay himself, he admitting that he got the money subscribed to pay the purses as treasurer.

At the end of the plaintiff's case the defendant's counsel submitted that the plaintiff should be nonsuited, there being no evidence to entitle the plaintiff to recover as for money had and received: that the evidence shewed that the defendant received the moneys in question for the use of the turf club.

The learned Judge had a strong opinion against the plaintiff's right to recover, but he did not desire to stop the case. The plaintiff's counsel would not consent to leave being reserved to enter a non-suit, and the case was left to the jury, the learned judge telling them to find for the plaintiff if they were satisfied that the defendant received moneys to pay the purses in question to the plaintiff; the defendant's counsel objected to the case being so left.

The jury found for the plaintiff and \$460 damages.

During last Michaelmas Term *D. B. Read*, Q. C., obtained a rule *nisi* to set aside the verdict and for a new trial. He cited *Baron v. Husband*, 4 B. & Ad. 611; S. C. 1 N. & M. 730; *Howell v. Butt*, 5 B. & Ad. 504; S. C. 2 N. & M. 381; *Cobb v. Becke*, 6 Q. B. 930; *Allport v. Nutt*, 1 C. B. 974.

*Harrison*, Q. C., contra, cited *Gates v. Tinning*, 3 U. C. R. 296; *Earl of Mountcashell v. Barber*, 14 C. B. 53; *Jones v. Carter*, 8 Q. B. 134; *Daintree v. Hutchinson*, 10 M. & W. 85.

MORRISON, J., delivered the judgment of the court.

We are of opinion that this rule should be made absolute. Upon the evidence given at the trial the plaintiff was not entitled to succeed. No liability was shewn or



admitted on the part of the defendant to pay the plaintiff the amount of the purses in question. All that the testimony amounted to was, that the defendant admitted receiving subscriptions as treasurer of the club: that the club was indebted to him for advances previously made, and that he claimed his right to and did retain \$600 of the moneys so received by him to pay himself, and which money, if not so retained, would have been applicable to the payment of these purses or liabilities of the club.

The case of *Baron v. Husband* (4 B. & Al. 611, S. C. 1 N. & M. 728), is an authority against the plaintiff. As said in that case by Lord Denman, C. J., "This action will not lie for want of privity between plaintiff and defendant." To support this count it is, as a general rule, necessary to prove that the defendant actually received money for the benefit of the plaintiff under such circumstances as to create a privity of contract between him and the plaintiff: See *Barlow v. Brown* (16 M. & W. 128); *Cobb v. Becke* (6 Q. B. 930). The mere fact that the money belongs to the plaintiff is not sufficient, if the defendant is accountable for it to another: *Black v. Siddaway* (15 L. J. Q. B. 359.) Here the defendant received the moneys in question in small sums from various subscribers as treasurer of this turf club, and not as the agent of or for this plaintiff, and he held them as treasurer. What his duties were as treasurer did not appear, but assuming them to be that of an ordinary treasurer, he held them subject to the control and direction of the club, and continued accountable to the members thereof until he entered into some binding engagement with the plaintiff to hold the amount he (the plaintiff) was declared entitled to as winner for his (the plaintiff's) use.

The evidence shews no such engagement, and nothing appears from which it might be implied that as treasurer the defendant was liable to the plaintiff as for money had and received, because his horses won races. On the other hand, the defendant's conduct negated any such engagement or liability.

The rule must be absolute for a new trial without costs.

*Rule absolute.*

LYNDSAY V. THE NIAGARA DISTRICT MUTUAL FIRE INSURANCE COMPANY.

*Policy—Addition to premises insured—Increase of risk—Pleading—Surplusage.*

A policy provided that it should be avoided by any additions made to the building insured, unless written notice thereof were given to the secretary and the consent of the Board of Directors thereto endorsed on the policy, signed by the President and Secretary. Defendants in their plea stated an addition without notice or consent, by which they alleged that the premises became materially altered so as to increase the risk. The plaintiff took issue.

*Held*, that the latter averment being surplusage need not be proved, and that defendants were entitled to succeed on shewing the addition without notice, although the jury found the risk not increased by it.

There was also an equitable replication of parol waiver by an agent duly authorized, but his authority was not proved; and *semble*, that such waiver could be no answer.

ACTION on a fire policy on a frame store of the plaintiff, situate in the village of Princeton, insured for \$1,100.

The declaration was in the usual form, setting out in full the conditions endorsed on the policy, and among them those set out in the pleas hereafter mentioned. Seven pleas were pleaded, but at the trial all were given up except the 3rd, 4th, and 5th pleas.

The third plea, referring to the conditions of the policy, stated that one of them was, that if any alterations, erections or additions be made in or to any building insured by the defendants, the policy thereon shall become vitiated and void, unless written notice containing full particulars be given to the Secretary of the Company, and consent of the Board of Directors obtained thereto, endorsed on the said policy, and signed by the defendants' President and Secretary. Then it averred that after the making of the policy, and before the loss, the plaintiff erected and built and attached to, the rear of the store, an addition consisting of a wooden building, whereby the premises became materially altered so as to thereby vary and increase the risk, without giving written notice, &c., to defendants, and without their consent, &c., indorsed on the said policy, &c.

The fourth plea set out, referring to the third plea, that owing to the fact of such addition being built and attached

to the building, &c., the distance between the end of said new addition farthest from the store and the next building was much lessened, whereby the risk was permanently increased, &c.; and although a reasonable time elapsed before the fire and loss, &c., for such notice of the happening of the said erection or addition to be allowed by the indorsement on the policy, yet the plaintiff did not give such notice to the Secretary, &c., nor was the same allowed, &c., and the policy became void, &c.

The fifth plea was, that before the making of the policy an application was made by the plaintiff for the insurance, and in such application the situation of the store, &c., was represented and described, &c.; and that after the making of the policy new and additional buildings were erected, which were adjacent to and around the said building or store, &c.; and although the risk to the store was changed thereby, yet the plaintiff did not make to defendants any new representation in writing of such new and additional buildings, or of the change of risk thereby, whereby the policy became void, &c.

The plaintiff took issue on these three pleas, and he replied on equitable grounds to them, that the condition in the said pleas mentioned is as follows: By-law 14. The following circumstances will vitiate a policy, unless written notice containing full particulars shall be given to the Secretary of this Company, and the consent of the Board obtained thereto, endorsed on the policy, and signed by the President and Secretary, the Board reserving to themselves the power to approve or reject such:—1st. Of the removal of goods or other personal property insured in this company. 2nd. Of alienation by mortgage or otherwise, or any change in title or ownership of property insured in this Company. 3rd. Of any insurance subsisting, or that shall be effected in any other Company, on property insured in this Company, without the consent of the Board. 4th. Of any alterations or additions to the building insured in this Company. 5th. Of the erection or alteration of any building within the limits described in the application. 6th. Of

any misrepresentation in the answers given to the several queries in the application. 7th. Any change in the occupancy of the premises assured.

By-law 15. That when any alterations or additions are made to any building insured with this company, notice of the same shall be forthwith given to the Secretary, in writing; and the agent shall, if so directed, survey the same and report to the Board whether such alterations or additions have increased the risk; and if so, an additional premium note shall be taken for such amount as shall be determined upon by the Board; and it may be optional with the Company to reject such alterations, and to cancel the policy. And in the event of any alterations to any adjacent buildings, or by the erection of others, or of any other thing deemed dangerous, within the limits described in the application of the insured, a similar notice shall be forthwith given, and the Company may in like manner cancel the policy, the same to be recorded on the policy by the Secretary; but no such alterations or additions to form a part of the original claim in the event of any loss by fire. And the plaintiff further says, that after the making of the said alterations in the 3rd, 4th, and 5th pleas mentioned, which consisted in building a wooden shed next adjoining to the said premises so insured, and before any breach by the plaintiff of the said condition, the plaintiff did forthwith give verbal notice thereof to the agent of the defendants, one Thomas Ryal, he being the proper person to receive the same, and having the power and authority from the defendants to receive the same, and to make the representations and agreement hereinafter mentioned; and the said agent did then inspect the said alterations so made, and did then for and on behalf of the said Company represent to the plaintiff that the same was not an alteration or addition to the building so insured within the meaning of the said policy, and that the same did not increase the risk of the said insurance, and that the same was not required to be notified in writing to the said Company, or the consent of the Board obtained thereto to be endorsed on the



said policy ; and the said agent did then, as did also the said Company, waive, exonerate and discharge the plaintiffs from giving the said written notice, or procuring the consent of the said Board to the said alterations to be endorsed on the said policy.

The trial took place at Woodstock, in October, 1868, before Morrison, J.

The policy was admitted and put in, also the plaintiff's application for the insurance. The loss was also admitted.

The plaintiff called Thomas Ryal, who stated that he was an agent of the Company for that part of the country : that he knew the store and its situation, that he had built it and sold it to the plaintiff. He also stated that after the insurance the plaintiff called on him to inspect a shed and root-house he had built in the rear of the store insured : that before the erection of these additions the store was seventy-six feet from the Town Hall, as described in the plaintiff's application, and set out on a diagram produced, and that the new erections caused the building to be nearer the Town Hall. He also said that in his opinion the erection did not increase the risk, although the shed and root-house adjoined the store, and that the plaintiff called his attention to the alteration with a view to his giving notice to the Company, but that he believed he told the plaintiff it was unnecessary to do so. He further said, he was only an agent for the purpose of obtaining risks and collecting assessments, and for which duties he was paid by fees, and that he understood the fire originated in the shed.

With this testimony the plaintiff closed his case, and *M. C. Cameron*, Q. C., for defendants, submitted that the plaintiff should be non-suited, as no notice of the alterations and addition was given to the Secretary, &c., as provided for.

*J. H. Cameron*, Q. C., for the plaintiff, contended that as the pleadings stood the plaintiff was entitled to recover. The defendants' counsel urged that Ryal was not an agent of the Company for the purpose of inspecting, or of waiving any right of the Company : that he had no power to bind

the Company, nor was any proved : that he (Ryal) was the agent of the plaintiff, and that the notice must be to the Secretary : that the defendants' pleas were proved, and the plaintiff's replication was not proved but negatived.

The learned Judge, although his opinion was against the plaintiff, would not stop the case, but allowed it to go to the jury, reserving leave to defendants to move to enter a non-suit on the case as it stood.

The defendants then called witnesses, who gave evidence that the fire originated in the shed, and that the buildings were within fifteen or twenty feet from the Town Hall, and adjoining the insured premises ; and two of the witnesses stated that the addition increased the risk. The plaintiff called in reply the agent of the Western, another Company, who was of opinion that it did not increase the risk materially.

The learned Judge asked the jury to say whether they were of opinion, from the evidence, the additions increased the risk, and whether the plaintiff had proved the equitable replication. If they found on these two points affirmatively, to say the amount of damages ; if otherwise, as to both points, or one of them, to say so, with a view to a verdict being entered and reserving leave, as the case might be. Defendants' counsel renewed his objections taken at the close of the plaintiff's case. The jury found the risk not increased and the equitable replication proved, and a verdict was entered for the plaintiff for \$1,201.75 damages, and leave was reserved to defendants to move to enter a non-suit, if the court should be of opinion that the learned Judge should have ruled the plaintiff was not entitled to recover.

During last Michaelmas Term *McMichael* obtained a rule *nisi* to enter a non-suit, pursuant to leave reserved, or for a new trial, the verdict being contrary to law and evidence, and for misdirection, &c. ; and for non-direction, in not telling the jury that the evidence having established that additions had been made and not notified to the Secretary, the plaintiff was not entitled to recover, and in not

telling the jury that the defendants had not waived notice of the additions, &c.

During this term *J. H. Cameron*, Q. C., shewed cause.

*McMichael* supported the rule, citing *Reid v. Gore District Mutual Ins. Co.*, 11 U. C. R. 345 ; *Merrick v. Provincial Ins. Co.*, 14 U. C. R. 453 ; *Lomas v. British America Ins. Co.*, 22 U. C. R. 310 ; *Scott v. Niagara District Ins. Co.*, 25 U. C. R. 119 ; *Stokes v. Cox*, 1 H. & N. 320, 533.

MORRISON, J., delivered the judgment of the court.

We are of opinion that the defendants are entitled to our judgment. The conditions set out in the equitable replication are those appearing on the policy as By-laws 14 and 15. The evidence established the defendants' pleas, that an addition to the [insured building was erected, that the same was not notified to the Secretary and the consent of the Board obtained thereto endorsed on the policy, and signed by the President and Secretary. That circumstance, under by-law 14, would vitiate the policy, and render it void. The building was afterwards destroyed by fire, which originated in this very additional erection. That fact, although of itself not material, only shews that the addition was an element of danger.

As to the equitable replication, we think there was no evidence to go to the jury in support of the main allegation, that Ryan was an authorized agent to make the agreement relied on. See the remarks of Draper, C. J., on this matter in *Scott v. Niagara District Ins. Co.* (25 U. C. R. 126.)

On the trial I thought it better to take the opinion of the jury as to whether the addition in question increased the risk, with a view to the subject being discussed, as it was then contended, as pressed on us during the argument on this rule, that the defendants by their pleas made the question of increase of risk the material question in issue, so that if the jury found the risk was not increased, the plaintiff was entitled to recover. It is true that the

pleader has introduced into the pleas a statement which may be considered as surplusage and redundant ; but *utile per inutile non vitiatur*, for 'if we reject the words "whereby the premises became materially altered so as to thereby vary and increase the risk," the plea would still be good ; and, as said by Tindal, C. J., in *Palmer v. Gooden* (8 M. & W. 894,) "A party does not make an issue upon the substantial matter to be tried by the jury bad, merely because he includes in it something of total surplusage and immateriality." The real defence pleaded and set up by the defendants is, that by the act of the plaintiff in erecting the additional building, and his not complying with the conditions of the policy by giving notice of the same to the Secretary, &c., the policy was vitiated and void. To avoid that defence the plaintiff sets up, that by a parol agreement made through an agent of the defendants, compliance with the conditions was waived and dispensed with, an answer which if proved would not it seems be a good one, for according to the case of *Scott v. Niagara District Ins. Co.*, in this court, above cited, a parol waiver by the defendants' Managing Director and Secretary would be no answer to a plea such as here pleaded, as it would be setting up a substituted parol contract in answer to the sealed policy.

We think the defendants are entitled to have this rule made absolute to enter a non-suit. The result of this case may be hard on the plaintiff, from his being led into error by an agent of the Company ; but, as I have felt it to be my duty to tell jurors in several cases tried before me against this Company, if the insured does not pay attention to or comply with the conditions of the policy he has himself to blame, as the Company take special means to warn the insured of his duty by conspicuously printing in large colored letters at the top of the policy, "Be sure and read the conditions on the inside hereof, as any deviation therefrom will render the insurance void," and by appending at the end a similar admonition in case of omitting to give any of the notices ; and by printing on the back of the



policy as follows: "N. B.—Be particular in reading the within policy and its conditions, and observe that notice in writing must be given to the Secretary of all changes in the risk by alterations, erections, or otherwise."

The rule must be absolute to enter a non-suit.

*Rule absolute.*

## IN RE MILES AND THE CORPORATION OF THE TOWNSHIP OF RICHMOND.

### *The Temperance Act of 1864—By-law—Publication.*

A By-law to repeal a By-law prohibiting the sale of intoxicating liquors, under the Temperance Act of 1864, was first published on the 2nd of October, 1868, with a notice for a meeting of the electors on the 4th of November, at two, p.m. On the 9th, 16th, and 23rd, it was again published, with a notice for the meeting at 10, a.m., on the 4th, when the poll was held.

*Held*, that the first notice was bad, for the statute requires the meeting to be at 10, a.m., and the meeting in consequence was not held within the week next after the fourth week of publication, as directed by the act. The by-law was therefore quashed.

The clerk was not present at the meeting, and the reeve acted both as presiding officer and poll clerk, certifying the proceedings in both capacities. *Quære*, whether the By-law would have been bad on this ground.

*Held*, that the By-law, upon the facts stated below, was sufficiently certified, under the seal of the corporation.

*Osler* obtained a rule in last Michaelmas Term, calling on the corporation to shew cause why a by-law submitted to the electors for approval in November last, under the Temperance Act of 1864, should not be quashed, on various grounds; among others—that the by-law was not duly notified and published for four consecutive weeks, with the notice required by the statute, sec. 5, sub-sec. 1: that the reeve, who presided at the meeting of electors, improperly assumed to act as the poll clerk, and took the votes of the electors, and that the poll book at the close of the poll was not certified as required by sec. 5, sub-sec. 8 of the act. The rule was drawn up on reading a certified copy of the by-law, and the by-law repealed by it, and on affidavits.

The by-law in question was one repealing a by-law adopted by the electors of Richmond in February, 1865, passed under the provisions of the Temperance Act of 1864, prohibiting the sale of intoxicating liquors in the township, and was as follows :

"Whereas thirty of the electors of Richmond have required that the by-law prohibiting the sale of intoxicating liquors and the issuing of licenses therefor be repealed :

"Be it therefore enacted by the Municipal Council of the Township of Richmond, that said by-law be and is hereby repealed ; and that this by-law be submitted to the electors for their approval or rejection.

(Signed) "THOS. SEXSMITH,  
(Signed) "O. D. SWEET, *Clerk.*" *Reeve.*

It appeared from the affidavits and papers filed that this by-law was published in a weekly paper, called the *Weekly Express*, published in Napanee, as follows : In the issue of the 2nd of October, 1868, this notice was published :

"Notice is hereby given to the electors of the Township of Richmond, that a meeting of the municipal electors of said municipality will be held in the Town Hall, Selby, on Wednesday, the 4th day of November next, *at the hour of two in the afternoon*, for the taking of a poll to decide whether or not *the above* by-law is approved by said electors

"O. D. SWEET, *Town Clerk.*"

*Underneath*, in the same column, was published a copy of the by-law. In the issue of the 9th of October appeared the by-law, and below it a similar notice to the above, with the hour stated to be at ten in the forenoon. On the 16th and 23rd of October were published notices the same as that of the 9th of October, and on the 30th of October the notice above was published, but *no copy* of the by-law; and the poll was held on the 4th of November—when 144 votes were given in favor of, and 138 against the by-law, the relator alleging that six were improperly allowed.

It appeared also that the reeve of the township presided at the meeting for taking the poll : that the clerk of the

township, or secretary-treasurer, was not present, and did not act as poll clerk, nor was any person in his absence named to act as poll clerk, but that the reeve himself acted both as presiding officer and as poll clerk; and the reeve after the poll closed certified the number of votes by appending his name to the certificate as returning officer, and countersigning it also as poll clerk.

During last term, *McKenzie*, Q. C., shewed cause, taking several preliminary objections, and among others, that the by-law was not properly certified, as to which he cited *Re Croft and The Municipality of Brooke*, 17 U. C. R. 269; *Buchart and The Municipality of Carrick*, 6 C. P. 131.

*Osler* supported his rule, citing *Baker and The Municipal Council of Paris*, 10 U. C. R. 621; *Hamilton v. Dennis*, 12 Grant 625; *Coe and The Corporation of Pickering*, 24 U. C. R. 439.

MORRISON, J., delivered the judgment of the court.

The only preliminary objection we think it necessary to notice is, that the copy of the by-law was not certified by the seal of the corporation. The relator swears that the copy annexed to his affidavit "is a certified copy, with the seal of the said corporation, received by me from the clerk of the municipal council of the said township." Underneath it is a certificate at length, signed by the clerk, certifying it to be a true copy, and in the margin is the seal of the corporation; that is, one stamped and impressed on the paper, leaving a circular impression in ink, with the words, "Municipal Township of Richmond." It is sworn to be the seal, and as such received from the clerk with his certificate. Such a certificate was deemed sufficient in *Kinghorn and The Corporation of Kingston*, (26 U. C. R. 133); and as to the seal itself, the case of *The Queen v. Inhabitants of St. Paul, Covent Garden*, (7 Q. B. 232), supports it.

As to the by-law in question, we are of opinion that it must be quashed. In the case of *Coe and The Corporation of Pickering*, it was held that the four weeks' notice required

by the statute commences and must be computed from the day of the first publication of the notice, and the poll taken within the week next after the fourth week. If we could hold the first notice, published on the 2nd of October, to be a good notice, the first week would have commenced on that day; but that notice cannot be taken to be a good one, as the statute requires the notice to be for the hour of *ten* o'clock in the *forenoon*, and not two in the afternoon. The first regular notice under which the meeting was held to approve or reject this by-law, was that of Wednesday, the 9th of October, and which was the commencement of the four weeks.

The notices of the 16th and 23rd of October were also regular, the one of the 30th October omitted the by-law altogether, and the poll was taken on the following Wednesday, the 4th of November. Assuming that the defective notice of the 30th was good, the poll was not taken as required by the statute, "on some day within the week next after such four weeks'" notice, but on the 4th of November, a day of the third week, the fourth week ending on the 6th of November; and upon the authority of *Coe and the Corporation of Pickering* (24 U. C. R. 439) the objection that due notice was not given must prevail.

Such being the case, it is not necessary to consider whether the poll was properly taken by the reeve acting as poll clerk as well as presiding officer, and certifying the proceedings in both capacities. It is, however, quite evident the Legislature intended that the duties of presiding officer and poll clerk should be performed by two distinct persons, and it is equally clear that in the absence of the clerk, the provisions of sub-sec 4 of sec. 5 were never intended to authorize the presiding officer to name himself to act as poll clerk.

*Rule absolute.*

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## LITTLE V. AIKMAN ET AL.

*Will—Devisee an attesting witness—Power of sale—Construction of.*

Where a devisee witnesses the will the devise to him is void, although there are two other witnesses, and the will would therefore have been sufficiently attested without him.

*Held*, (the court being left to draw inferences of fact), that upon the evidence set out below it must be inferred that the devisee, whose name was subscribed as a witness, did see the testator sign, although he swore that he thought he did not, and that he subscribed in his presence.

Testator devised the land in question to his wife for life, remainder to his nephew, T., in fee. He then devised specific land to be disposed of by his executors for the payment of his debts, and added "and I also do hereby acknowledge and authorize them to sell, grant and convey in full and proper manner, any, all, or such of my real estate as may be necessary to the payment and liquidation of any and all such just debts as may be due by me, and not otherwise provided for."

*Held*, that under this clause the executors had power to sell the land in question.

They conveyed to one P., a creditor, who was to pay the widow a certain sum for her dower, and the residue to other creditors:

*Held*, that the legal estate passed, whether the sale could be impeached in equity or not.

Executors in such a case are not bound to sign the deed in presence of each other, as arbitrators executing an award.

EJECTMENT for the front halves of lots 57, 58, and 59, in the first concession of Colchester.

The plaintiff claimed title under a deed from George Little, who was the heir-at-law of John Little, the owner in fee simple.

The defendants denied the plaintiff's title, and set up title in themselves as grantees, through a series of conveyances, under the will of the said John Little, and also by length of possession; and as to one acre by a conveyance derived from John Little.

The cause was tried at the spring assizes for 1868, before Richards, C. J., at Sandwich.

The paper title of both parties was not disputed.

The facts were, that Robert Little was patentee of the Crown, and conveyed to John Little, the testator, whose heir-at-law, George Little, conveyed to the plaintiff.

The defendant claimed by deed from John Little the younger, as the devisee of John the testator, to William

Little, who conveyed to the defendants; and they also claimed by deed from Mary Little, Thomas Hawkins and John Brush, trustees under the will of John, the testator, to J. R. Park, who conveyed to Smith, who conveyed to J. R. Park, who conveyed to the defendants.

By the will, dated 28th January, 1842, the testator bequeathed all his personalty to his wife absolutely. He devised the front parts of lots 57, 58, and 59, to her for life, life, remainder to his nephew John in fee. To his sister Elizabeth he devised lot 14 in the first concession of Gosfield, for life, remainder to his said nephew in fee, on condition of his maintaining George, the son of Elizabeth, for life, in case he should survive his mother. The will then proceeded:

"I will and bequeath the rear parts of lots numbers fifty eight and fifty-nine, containing one hundred acres in each lot, be the same more or less, after setting off that part above apportioned to my wife Mary Little, the rear to be disposed of by my executors for the payment of my just debts. Also I will that all my unlocated grants of land shall be disposed of by my executors for the payment of my just debts; and also my right in lot number fifty in the first concession of Colchester, likewise to be disposed of for the payment of my just debts. And I also do hereby acknowledge and authorize them to sell, grant and convey in full and proper manner, any, all or such of my real estate as may be necessary to the payment and liquidation of any and all such just debts as may be due by me, and not otherwise provided for. Hereby revoking all former wills by me made.

"In witness whereof," &c.

"The above instrument consists of one sheet of paper, was now here subscribed by John Little, the testator, in the presence of each of us, and, was at the same time declared by him to be his last will and testament, and we at his request sign our names hereto as attesting witnesses.

"(Signed) { JNO. R. PARK, Colchester.  
JOHN MALOTT, Gosfield.  
JOHN LITTLE, junior, Colchester."

The verdict was taken for the defendant, with leave to the plaintiff to move to enter a verdict for him, if the court should be of opinion that under the evidence and the points taken he was entitled to recover, the court to draw inferences of fact if necessary.

The exception taken to the defendants' claim of title derived from John the younger, as devisee of the testator, was that John was one of the three witnesses to the will; and the exception taken to the title derived from the trustees of the will was, that they had no power to sell the land in question at all.

The defendants answered the first objection by evidence which they alleged shewed that John, the devisee, though he had subscribed the will apparently as a witness, was not a witness in fact; and secondly, although a witness, that as there were three witnesses to the will, and two only were required—the will having been made in 1842—and as he was the last of the three who signed, his signature was unnecessary, and the will was a complete instrument before he attached his name; and as to the last objection, they contended that by the terms of the will the trustees had the power to sell which they had exercised.

The evidence as to the first objection was as follows:

John Little, the devisee, was called by the plaintiff. He said—"I don't think I saw my uncle (the testator) sign his will. I signed it in his room, in his presence; he did not ask me to sign it. I objected to sign it. Mr. Brush told me he wanted me to sign it; he said I would be a good witness. Mr. Park I think was there. Mr. Malott and Mr. Brush were there when I signed the will. My uncle had signed it before I got there; my uncle asked me to send for Mr. Brush to write his will; when I came back Mr. Brush was there writing it. I was in and out of the room when he was writing it, waiting on my uncle; I can't say if I saw my uncle sign it or not, or if Malott or Park did. After the will was written, Mr. Brush asked me to witness it in presence of my uncle; he heard this. I did see my uncle's signature to it. I don't recollect if I saw

him sign it, nor can I say if he did or did not acknowledge it to be his signature or his will.

On cross-examination he said—I had some objections to sign it. I considered if he had willed me property, I ought not to sign it as a witness. Brush said I might sign, it would make no difference. When I went to sign I recollect there were two names wrote down as witnesses. I am sure I was the last one. The will had then been signed by my uncle. I don't recollect of signing the memorial on which it was registered. I always understood my uncle was to give me his property ; he took me to raise. I don't think the will was read over to me till after the funeral.

Mr. Brush, who drew the will, was examined on this point, and gave evidence to about the same effect as that before stated.

In Easter Term, *M. C. Cameron*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict entered for them should not be set aside, and a verdict entered for the plaintiff, pursuant to leave reserved.

The rule was argued in the same term, but as no judgment had been given before the late changes in the court, another argument was directed in this term.

*S. Richards*, Q. C., and *Holmsted*, shewed cause. The statute 25 Geo. II., ch. 6, declares that wills attested by devisees shall not be void, but the devisees only in favor of the witnesses. This statute has been held not to apply to personal property : *Emanuel v. Constable*, 3 Russ. 436. This will was perfect by the subscription of two witnesses to it before John, the nephew of testator, added his name to it ; his name therefore may be rejected. The evidence shews that the devisee was not a witness properly, for he did not see the testator sign it nor the witnesses sign it. The case of *Doe dem. Taylor v. Mills*, 1 M. & Rob. 288, is a *nisi prius* decision only. The mere signature by the nephew to the will will not make him a witness ; he must sign it at the request of the testator : *Westbeech v. Kennedy*, 1 V. & B. 362 ; *Powell on Devises*, 86. The executors had



power to sell the lands : *Gregory v. Connolly*, 7 U. C. R. 500 ; *Hopkins v. Brown*, 10 U. C. R. 125 ; *Moore v. Power*, 8 C. P. 109 ; *Chance on Powers*, secs. 141, 143, 144.

The general power at the end of the will is not inconsistent with the earlier clauses ; and besides, being the last clause, the general power should prevail : *Greene v. Wigglesworth*, 1 Swanst. 234 ; *Duff v. Mewburn*, 7 Grant, 73 ; *Hamilton v. Buckmaster*, L. R. 3 Equ. 323. It will also be contended the power had not been well executed, because the bargain had not been made by all three trustees, and because it was not for cash, and because all three had not executed the deed jointly at the same time ; but the agreement that the purchaser from the trustees was to pay himself his own debt, and to pay the other debts with the surplus as far as it would go, was a good sale at law at any rate, and the power had been well executed by all acting together : *Chance on Powers*, sec. 706.

*M. C. Cameron*, Q. C., and *Moss* supported the rule. The case of *Doe dem. Taylor v. Mills* is not a *nisi prius* decision only, for it was moved in afterwards and adopted by the full court, as appears in the report of the case : 1 Moo. & Rob. 290. The name of one witness cannot be rejected because there is a sufficiency of witnesses without him, no matter in what order his name may be, whether the first or the last ; all the witnesses, however numerous, are persons selected by the testator as witnesses to his will : *Ryan v. Devereux*, 26 U. C. R. 100 ; *Wigan v. Rowland*, 11 Hare 157 ; *Hatfield v. Thorpe*, 5 B. & Al. 589. John, the nephew, was shewn to have been a good and complete witness ; it was not necessary the testator should have requested him to subscribe : *White v. Trustees of British Museum*, 6 Bing. 310 ; *Wright v. Wright*, 7 Bing. 457 ; *Johnson v. Johnson*, 1 Cr. & M. 140, 3 Tyr. 73. It was sufficient that he subscribed with the testator's knowledge : *Gwillim v. Gwillim*, 29 L. J. Prob. 31 ; *In re goods of John Holgate*, 1 Sw. & Tr. 261 : *Young v. Richards*, 2 Curteis 371 : *In re goods of Jane Thomas*, 1 Sw. & Tr. 255 ; *Bennett v. Sharp*, 1 Jur. N. S. 456 ; *Gregory v.*

*Dyke*, 4 Notes of Cases 620 ; *Jarman* on Wills, 3rd ed., 79 ; *Leach v. Bates*, 6 Notes of Cases, 699 ; *Levisconte v. Finch*, 3 Notes of Cases 122 ; *Owen v. Williams*, 32 L. J. Prob. 159. The executors took only a mere power to sell, and conditional only, if there were debts and the other funds were not sufficient to pay them. Under a general power a purchaser is not put to enquire how or why the power is exercised, but under a special power a purchaser is bound to satisfy himself that the necessary circumstances existed to justify the exercise of the special power. The purchase was plainly limited and conditional, to sell for debts, and for those debts which were not otherwise provided for, that is, which were not paid out of the rest of the property. The sale also should have been made for cash, and of those lands which had been specially set apart for that purpose and which did not cover the lands in question : *Combes's* case, 9 Co 75 b. ; *Sugden* on Powers, 6th ed., 622 ; *Hawkins v. Kemp*, 3 East 430 ; *Zouch v. Woolston*, 1 W. Bl. 281 ; *Doe v. Smith*, 1 B. & B. 97 ; *Hands v. James*, *Comyn's* Rep. 531 ; *Read v. Shaw*, Ch. 1807, referred to in *Sugden* on Powers, 7th ed. vol. II., p. 488 ; *Chance* on Powers, secs. 1807, 2708 ; *Cowgill v. Lord Oxmantown*, 3 Y. & C. 375 ; *Cholmeley v. Paxton*, 3 Bing. 207 ; *Cockerell v. Cholmeley*, 10 B. & C. 564 ; *Cockerell v. Cholmeley*, 1 Russ. & Myl. 418 ; *Cockerell v. Cholmeley*, 1 Cl. & Fin. 60 ; *Doe dem. Willis v. Martin*, 4 T. R. 39 ; *Watkins v. Williams*, 3 Mac N. & G. 622 ; *Robinson v. Briggs*, 1 Sm. & G. 206. The executors should also have executed the deed at the same time and place, and they should all have joined in the same original bargain for the sale to Parks. They are governed in this respect by the same rule as arbitrators : *Wade v. Dowling*, 4 E. & B. 44.

ADAM WILSON, J., delivered the judgment of the court.

The fact that there was a sufficient number of witnesses without numbering the devisee as one of them does not remove the objection to his taking as a devisee under the 25 Geo. II., ch. 6. The same point arose in *Doe dem. Taylor*

v. *Mills* (1 Moo. & Rob. 288), where there were four subscribing witnesses, while three, as the law then stood, were all that were required ; and the same argument that was used here was used there, but did not prevail.

There may be much to be said in favor of supporting a devise when the will is sufficiently attested by witnesses quite disinterested, but there is much also to be said against it, and as the case referred to has never been questioned we must of course adopt it as containing a true exposition of the law on the subject.

The title of the defendants cannot therefore be maintained under that branch of it which they derive from the devisee, if he really be a witness to the will as he appears to be.

We are not prepared to say we can decide this question. There are many considerations which must be taken into account in forming a conclusion upon it, and I think it is more peculiarly a matter for the determination of a jury, under the direction of the court, than it is for the court definitely to pronounce upon.

The statute declares a will shall be sufficiently executed if the witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the testator. The old law is not altered but added to, and a subscription by the witnesses in presence of the testator is still sufficient.

The evidence shews the devisee signed the will as a witness in the testator's room and in his presence. The testator did not ask him to sign it, though he heard Mr. Brush, who wrote the will, tell the devisee to witness it. He said he did not recollect if he saw the devisor sign it, nor whether the testator acknowledged his signature or the will to be his.

If the testator signed the will in presence of the devisee, then it was properly executed and attested ; but this is the very point in controversy, for the witness says he cannot say whether he saw it signed or not. So, if the testator acknowledged his signature to the will to be his in pres-

ence of the devisee, the will would also be properly executed and attested, but here again the evidence is of the same negative kind. The witness said he could not say whether the testator acknowledged his signature to the witness or that the will was his.

The attestation clause that "the above instrument was now subscribed by the testator in the presence of each of us, and was at the same time declared by him to be his last will and testament, and we at his request sign our names hereto as attesting witnesses," contains strong intrinsic evidence that all due requisites were observed by both testator and witnesses to constitute it a fully executed and attested instrument, and the mere negative testimony of the witness that he did not recollect, that he could not say whether he did or did not see the testator sign, or see or hear him acknowledge his signature or declare the will to be his, should not be allowed to prevail after this length of time against the positive affirmative evidence which the attesting clause affords. And when to this is added that the witness, within six months after the date of the will, signed a memorial of the will as devisee, in which memorial he declared he was a witness to the will, the evidence seems too strong to be rebutted now by setting up the contrary allegation opposed to such overwhelming and concurrent testimony.

If the question were whether the will had been duly executed or not, that is, whether a valid will had been made or not, the witnesses not being interested parties at all, but speaking just as this witness did in the like negative manner, the presumption would be that, the long time the will had been undisputed and acted upon, the signatures really being those of the testator and of the witnesses respectively, the instrument having been made and executed for the purpose of its being an effective will, the dispositions made by it being such as the testator had desired to make of his property, and the special matter contained in the attesting clause, would be held to be quite enough confirmatory and affirmative evidence of the due



execution of the will to counterbalance the merely negative testimony of the witness or of both of them.

The cases which were cited in the argument, and are most of them to be found in *Williams* on Executors, 6th ed., 96 to 99, and the text of that standard work, are all to this effect.

The same presumption would arise also if there were only two witnesses and one of them were a devisee under the will.

The question is, does the same presumption arise against the devisee and witness when he is what may be called a supernumerary witness to the will?

The length of time that has elapsed from the death of the testator, during all which time the will has not been disputed, does not here operate one way or the other, for during Mary Little's life she had an estate for life, which was valid under any circumstances, and she did not die till many years after her husband; and the power which the executors acted upon in 1850, in the conveyance they made, and which they assumed to possess, and which the heir-at-law may have believed they did possess, may have been a reason for his not interfering in his ancestor's estate sooner than he did. There could be no object in the heir-at-law setting up the invalidity of the devise to John, the nephew, on account of his being a witness, when the estate was liable to be swept away from both the heir and the devisee by the sale of the executors, which all parties no doubt at the time deemed to be valid and effectual to divest and transfer the title.

We cannot say that the same presumption does not arise against the devisee in this case, although he is a supernumerary witness, just as if he had been one of the two essential witnesses; the facts against him are very strong that he did see the testator sign the will, or see or hear him acknowledge it to be his signature or will.

If the testator did sign or acknowledge his signature in presence of the witness, the further enquiry is, did the witness subscribe his name in presence of the testator or of the other witnesses.

The evidence he gave, and the other facts and circumstances before stated, lead to the conclusion the witness did sign his name in presence of the testator. He said: "Mr. Brush asked me to witness it in presence of my uncle; he heard this."

Then the fact of his signing the special attestation clause, and the memorial six months afterwards, in which he declared he was a witness to the will, leads to the conclusion that all was regularly done as the parties had professed to do it, and shews also how little weight must be given to the merely negative evidence. If a witness cannot remember the fact of his having signed the memorial of the will for the purpose of having it registered, in which memorial he had asserted he was a witness to the will, it is not remarkable he should not have been able to speak affirmatively to other matters that were not so easy or not more easy of remembrance.

If the testator did sign or acknowledge his signature in presence of this witness, and the witness set his hand thereto as a witness in the testator's presence, then this devisee was a perfect witness to the will, and is deprived of his devise; and upon this evidence we think, however hard it may be, that this is the fair and legal inference from the facts of the case and the surrounding circumstances. (*a.*)

It is unnecessary, therefore, to consider whether the witnesses subscribed in presence of each other, for this only is required when they do not sign in presence of the testator. If the case had rested upon the subscription by the witnesses in presence of each other, my impression is it would have failed, for the witnesses cannot acknowledge their signatures to each other, but must actually write them before one another.

The next questions are, whether the executors possessed the power to sell, which they assumed to exercise, and whether they lawfully exercised it. The testator bequeathed all his personalty to Mary, his wife, absolutely. He

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(*a.*) See *Wright v. Rogers*, Weekly Notes, 1869, p. 173.

devised the front parts of lots 57, 58, and 59 to her for life, the remainder to his nephew John in fee. He devised to his sister Elizabeth lot number 14, in the first concession of Gosfield, for life, remainder to John, his nephew, in fee, on condition of his maintaining George, the son of Elizabeth, for life, in case he survived his mother.

The will then stated :—"I will and bequeath the rear parts of lots 58 and 59, after setting off that part above apportioned to my wife Mary, the rear to be disposed of by my executors for the payment of my just debts. Also, I will that all my unlocated grants of land shall be disposed of by my executors for the payment of my just debts, and also my right in lot number fifty, in the first concession of Colchester, likewise to be disposed of for the payment of my just debts ; \* \* \* And I also do hereby acknowledge and authorize them to sell, grant and convey, in full and proper manner, any, all, or such of my real estate as may be necessary to the payment and liquidation of any and all such just debts as may be due by me and not otherwise provided for."

By this will particular lands are to be disposed of for payment of debts, and by this last clause the executors are also authorized to sell "any, all, or such of my real estate as may be necessary for the payment of my just debts not otherwise provided for." See *Duff v. Mewburn* (7 Grant, 73) ; *Greene v. Wiglesworth* (1 Swanst. 234) : that is, *all* the real estate, or *any or such* part of it as may be necessary for the payment of *debts which are not otherwise provided for*—that is, for payment of those debts which the lands specifically appropriated may by their sale not be sufficient to discharge.

We conceive the executors had power to sell the front parts of 57, 58, and 59, the lands in question in this clause, devised to the widow for life, with remainder in fee to John, the nephew, who was the witness to the will, for this clause overrides the whole will.

The question then is, whether they exercised the power lawfully. It is said they had only power to sell, that is, for

cash. The words are "to sell, grant, and convey," &c., "as may be necessary to the payment of my debts;" and it is said they did not sell for cash. It was also said they did not make the bargain of sale jointly, but that it was all done by one, the others only concurring in the deed.

The fact was, that the trustees had tried long to sell, but could not, and at last they conveyed the land to Mr. Parke, who was a creditor, and who by his agreement with them was to pay the widow so much for giving up her dower, and to pay the residue to other creditors. All this he did, and yet the debts of the estate were not satisfied. By this arrangement the legal estate passed: *Mackintosh v. Barber*, (1 Bing. 50); *Sugden on Powers*, 8th ed., 125.

It is not at all like the case which was referred to of *Cholmeley v. Paxton*, or *Cockerell*, in which the deed of the donees of the power was held void both at law and in equity, because in that case the trustees, having power to sell the land, sold, under a misapprehension of their title, the land less the timber, and another to whom the timber was supposed to belong concurred in the sale of the timber for his own benefit.

In that case plainly the trustees had not executed their power; but in multitudes of cases the trustees may effectually pass the legal estate although the conveyance may be impeachable in equity; but whether equity will interfere does not depend so much on the irregularity of the transaction as on its being considered disadvantageous to the estate or not.

But now, by the 29 Vic. ch. 28, sec. 2. copied from an English act, which was passed no doubt to meet the hardship which was occasioned by the decision of *Cockerell* and *Cholmeley*, such a transaction as was avoided then could not be avoided now.

We do not think the case of *Wade v. Dowling* (4 E. & B. 44) requiring arbitrators all to sign the award in presence of each other and at the one time, has ever been held to apply to the acts of executors and trustees. Arbitrators act judicially, and they must hear all the evidence



together, and act together in all that is done from first to last. Executors are certainly not so bound, as each one has the right at law to act independently of the other; and even when they must all unite in the same act, there is no rule requiring that all shall do every act—find a purchaser, fix the price, the conditions of sale, and the other matters of detail. It is enough that when all these are arranged they shall agree in the preliminaries which their colleague has agreed to.

This conveyance was well executed to pass the legal estate, and that is all we have to decide. The defence fails, however, on that branch of it which depends upon the conveyance of John Little, the nephew, for the devise to him was avoided by the fact of his being a witness to the will, which we certainly think he was.

The rule will be discharged.

*Rule discharged.*

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#### WHITEFORD V. MCLEOD, ADMINISTRATOR.

*Sci. Fa.*—*Equitable defence—Conveyance taken in satisfaction.*

*Sci. Fa.* upon a judgment for \$2000, against defendant as administrator of M., on a bond in that sum, conditioned for the payment of \$1200 by instalments, with a suggestion that two instalments were due and unpaid.

Plea, on equitable grounds, that before the *sci. fa.* issued it was agreed between the plaintiff and the defendant, with several others, the heirs-at-law of M., that they should convey to the plaintiff their interest in certain land, of which as such heirs they were seised in fee: that the consideration therefor should be \$2000, and their interest should be treated as so much in cash, which sum should be applied as a payment by the estate of M. to the plaintiff: that the defendant and the others accordingly conveyed their interest in the land to the plaintiff, and the plaintiff accepted such conveyance as representing \$2000, and credited the estate of M. with that sum: that the only debt then due by the estate to the plaintiff was the said judgment, on which the total amounts then due and accruing due was less than \$2000, whereby said judgment was satisfied; and such credit was the only consideration for the conveyance. *Held*, on demurrer, that the plea shewed a good defence.

SCIRE FACIAS upon a judgment recovered against the defendant as administrator of one James Whiteford,

deceased, on a bond made by the intestate, in \$2000, dated 29th August, 1860, conditioned for the payment of \$1200 in annual payments of \$100 each. Damages were assessed under the statute at \$337.50, for the instalments due in the years 1864, 1865, and 1866. Suggestion, that two more instalments were due and unpaid for the years 1867 and 1868, &c.

Defendant appeared to the writ, and pleaded, on equitable grounds :—That after the recovery of the judgment in the *scire facias* issued in this cause mentioned, and before the issue of the said *scire facias*, namely, on or about the 18th of February, 1868, it was mutually agreed by and between the said plaintiff and the defendant and several other persons, naming them, eight in all, that the said defendant and the said eight persons, should convey and assign all their interest to the plaintiff in certain lands described : that at and before the time of making said agreement five of the said eight persons, naming them, were the sons and daughters respectively, and the heirs-at-law and next of kin of the said James Whiteford deceased, who, at the time of his decease, was the owner in fee simple of the said lands, and they were seized of and possessed of the said lands and premises as such heirs-at-law, and one of them was the widow of the said James Whiteford deceased, and entitled to dower in said lands, and the defendant and two others, the husbands respectively of three of the eight persons named, the daughters of deceased ; and it was at the time of the said agreement further agreed by and between the said plaintiff and the other parties aforesaid, that the consideration for the said conveyance should be the sum of \$2000, and that the said conveyance and the interests of said parties (except said plaintiff) in the said lands and premises should stand for and represent, and be considered and to all intents and purposes treated as \$2000 in cash, and that the said sum should be applied as a payment of the indebtedness of the estate of the said James Whiteford deceased to the said plaintiff : that in pursuance and at the time of the said [agreement, and as

part of the same transaction, the said defendant and the said eight persons named, by indenture made between themselves, the said last mentioned parties, of the one part, and the said plaintiff of the other part, and duly executed, signed, sealed, and delivered by the parties, duly granted, conveyed, and assigned all their interests in the said lands and premises, which interests were of great value, unto the said plaintiff, his heirs and assigns, and the plaintiff then duly accepted and received the said conveyance, and the interests thereby conveyed, as being and representing the said sum of \$2000, and the plaintiff then duly acknowledged to have received the said sum of \$2000, and did receive the same from the said grantors in said conveyance, and did apply the said sum of \$2000 as a payment of the indebtedness of the estate of the said James Whiteford deceased to the said plaintiff, and the said plaintiff did then credit the said estate and the said defendant as the executor thereof in the said sum of \$2000 as so much cash, and to that amount the plaintiff did then discharge and agree to discharge the said estate and said defendant as such executor in respect of said indebtedness. And the defendant avers, that at the time of the said agreement and conveyance the only indebtedness of the said estate and said defendant as such executor to the plaintiff was the said judgment or bond on which said judgment was recovered, and the total amount then due and accruing due in respect of said bond, together with all principal, interest, costs and demands in respect thereof, and of said judgment, was less than the said sum of \$2000: wherefore, and by reason of the said premises, the said bond and judgment debt, and all interest, costs and demands in respect thereof, were and are fully paid, satisfied and discharged. And the defendant avers that the said credit and application of the said sum of \$2000, in manner aforesaid, was the only consideration ever given or paid by the said plaintiff for the said conveyance and the interests in the said land and premises thereby conveyed to the said plaintiff.

Demurrer and joinder.

*Ferguson*, for the demurrer.

*Spencer*, contra, cited *Stor. Eq. Jur.* sec. 876; *Marcon v. Bloxam*, 11 Ex. 586; *Lee v. Smart*, 8 E. & B. 313.

MORRISON, J., delivered the judgment of the court.

In this case our judgment must be for the defendant, as the plea discloses facts which we think would entitle him to an absolute and perpetual injunction.

Mr. Story, in his *Equity Jurisprudence*, sec. 876, says: "One of the plainest cases which can be put, of the propriety of granting an injunction to a judgment at law, is, where it has been in fact satisfied, and yet the judgment creditor attempts to set it up and enforce it, either against the judgment debtor, or against some person claiming under him, who is thereby injured in his property or rights."

Here the plaintiff is endeavoring to enforce his judgment recovered against the defendant as administrator, and which judgment stands as a security for the payment of the remaining instalments due or accruing due on the bond; and the defendant in answer says, that he has satisfied both judgment and bond by the arrangement set out in the plea—namely, by a sale and conveyance to the plaintiff of certain lands of the intestate for the price of \$2000, a sum more than sufficient to satisfy and discharge the judgment, costs and interest, and all moneys due on the bond, including the instalments now sued for, and all future instalments; and that the plaintiff, in consideration of the conveyance of the land to him, and which the plaintiff took as representing \$2000 in money, completely discharged and exonerated the defendant and the intestate's estate from the judgment, &c., and all moneys due or to become due on the bond.

The plaintiff contends the plea is defective, as it does not shew that he agreed to accept the lands or \$2000 in full satisfaction of the judgment and bond: that he only received the same to be applied as payment of the indebtedness of the estate of the intestate to the extent of \$2000;



and he also objects that in order to ascertain the rights of the parties it will require the taking of accounts, which cannot be done in this court.

We cannot see the force of the plaintiff's contention. It is true that the language of the plea is open to technical objections; but if we were to hold equitable pleas to be bad because they are inartificially drawn, our time, we fear, would be frequently occupied in useless discussions.

Now what is the substance of the plea; if issue had been taken on it what would the defendant have to prove to make out his defence? The plaintiff would claim at the trial two instalments of \$100 each; the defendant would then have to prove the arrangement and the conveyance of the land to the plaintiff, as set out in the plea, for \$2000, and then shew that the judgment, costs, and remaining instalments were less than \$2000,—the exact amount could easily be found by the jury,—and that the plaintiff received the land as \$2000 in money, and as a discharge of the judgment and all moneys secured by it and the bond. In that case the defendant would be entitled to a verdict, the judgment and bond being fully paid and satisfied. And supposing the plea to be what the plaintiff says it is—namely, that he received the \$2000 upon the understanding or agreement that he would pay all the debts of the estate. Then, if the defendant proved, as he avers in his plea, that the plaintiff's claim was the only debt due by the defendant as administrator and the estate, the defence would be equally made out.

In either way, if the facts stated in the plea shew the judgment and bond fully satisfied and paid, which we think they do, upon the ordinary principles of justice the plaintiff would not be entitled to succeed in this action, or to enforce the judgment.

*Judgment for defendant.*

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## MATHERS V. LYNCH.

*Chattel mortgage—Security against indorsements—Recital—Affidavit—Description of goods—Detinue—Mortgage given for money advanced at the time—Damages.*

A chattel mortgage under C. S. U. C. ch. 45, sec. 5, may be given as security against past or concurrent, but not against future, endorsements or liabilities. If it did not apply to past liabilities, then a mortgage to secure against them would not be avoided by the act for want of compliance with its provisions.

A recital, that the plaintiff had endorsed three notes, made by J., giving the dates, sums, and the time of payment, for the accommodation of J., and that J. had agreed to enter into the mortgage to indemnify and save harmless the mortgagee of and from payment of said notes, and from all liability or damage in respect thereof: *Held*, clearly sufficient.

An affidavit that the mortgage was made to secure the mortgagee against the payment of "such liability of" instead of for "the mortgagor" by reason of the notes: *Held*, sufficient.

The goods were described as all the goods in the house of the mortgagor, "in bed room No. 1, one bureau," &c., describing the articles in each room, and adding "all the hereinbefore described goods and chattels being in the dwelling house of the party of the first part, situate on Queen Street, in the town of Brampton; also one bay mare, one covered buggy," &c., "being on the premises of the party of the first part on said Queen Street; also the following goods and articles, being in the store of the party of the first part, on the corner of Queen and Main Streets, in the said town of Brampton, that is to say, 85 gallons of vinegar," giving a long list, "and also the following goods, being of the stock-in-trade of the party of the first part taken in the month of April last, that is to say, 16 pieces of tweed," &c.: *Held*, that all the goods were sufficiently described, for the last parcel of goods might be taken as described to be in the store.

Remarks as to the inefficiency of description of goods by locality.

Detinue is maintainable though defendant had not the goods when action brought; it is sufficient if he once had, and improperly parted with them.

*Held*, also, that the mortgage in this case, given under circumstances fully set out in 27 U. C. R. 244, was good as against creditors, the jury having found it to be *bona fide*; and that notice to the official assignee of the mortgagee's claim was immaterial.

The defendant having taken possession of the goods and premises as official assignee, and being sued by the mortgagee, claimed a deduction from the plaintiff's damages for rent, insurance, and taxes paid by him out of the proceeds of sales: *Semble*, that it should have been allowed only if due when he took possession; but this did not appear, and, under the circumstances, the court refused to interfere.

Some of the pleadings in this case are fully stated in the report of the decision on demurrer to the replication, in 27 U. C. R. 244. The first count was detinue; the second trover; the third, for money payable.

Pleas—To the first count, that the defendant did not, and does not detain the goods; to the second count, not guilty; to the third count, never indebted; to the first and second counts, goods not plaintiff's.

The fifth plea is set out in the previous report of the case, and also the replication to it. The defendant besides demurring to the replication, took issue on it.

The cause was tried before Morrison, J., at the last Fall Assizes for the County of York.

The facts appeared to be as follows: On the 14th September, 1867, by agreement in writing, and under the seal of John Mathers, made between John Mathers and William Mathers, it was recited that John had lately purchased from Moffatt, Murray & Co. a large quantity of dry goods for his store at Brampton, and to procure the purchase he had procured William Mathers, the plaintiff, to endorse certain notes made by John and delivered to Moffatt, Murray & Co., in payment of the goods, to the amount of \$2005.62, and dated the 14th September aforesaid; and that the plaintiff had endorsed the notes on the express condition that John should without delay, and within five days from that time, secure the plaintiff against the endorsements by a mortgage on real estate in Brampton, and by a chattel mortgage upon all the goods so purchased from Moffatt, Murray & Co., and upon all other goods in his store at Brampton, and on his household furniture, a buggy, a mare, and harness, &c. Then John covenanted to perform all that he had before promised to do.

On the 17th of September, 1867, John gave the mortgage on the real estate. This property had since been sold under a prior mortgage, so the plaintiff had received no benefit from it.

On the same day also he gave the chattel mortgage in question to the plaintiff. It was made between John Mathers of the first part and the plaintiff of the second part, and the recital was as follows:—

“Whereas the said party of the second part hath endorsed three promissory notes of the said party of the first part for

the sum of \$2005.62 in the whole, of lawful money of Canada, for the accommodation of the said party of the first part, one of such promissory notes being for the sum of \$668, payable five months after the date thereof, one other of such promissory notes being for the sum of \$669.62, payable six months after the date thereof, and the other of such promissory notes being for the sum of \$668, payable seven months after the date thereof, and all of said promissory notes being dated, made and endorsed, on the 14th day of September instant.

And whereas the said party of the first part hath agreed to enter into these presents for the purpose of indemnifying and saving harmless the said party of the second part of and from the payment of said promissory notes, or any part thereof, and from all liability, loss or damage in respect thereof."

Then John, in consideration of the premises and of one dollar, granted to the plaintiff "all and singular the goods, chattels, furniture and other things hereinafter particularly mentioned and expressed, that is to say, in the house of the party of the first part: in bedroom number one, one bureau," &c., &c., and so proceeding through the different rooms of the house, and concluding as follows: "all the hereinbefore described goods and chattels being in the dwelling house of the party of the first part, situate on Queen Street, in the town of Brampton."

This may be called the first parcel of property conveyed.

The second parcel was described as follows: "Also one bay mare, one covered buggy, two sets of single harness, one saddle, one cutter, one sleigh, being on the premises of the party of the first part, on said Queen Street, and also one red and white cow, and three buffalo robes, also on the said premises."

The third parcel was described as follows: "Also the following goods and articles being in the store of the party of the first part, on the corner of Queen and Main Streets, in the said town of Brampton, that is to say, "eighty-five gallons of vinegar," &c., giving a list of several pages.



“And also the following goods, being of the stock in trade of the party of the first part, taken in the month of April last, that is to say, sixteen pieces of tweed,” &c. To have and to hold, &c.

Provided that if John should pay the notes or indemnify the plaintiff against the same, this indenture should be void.

It was then provided, that in case of default in payment of the notes, or in case John “shall attempt to sell or dispose of, or in any way part with possession of the said goods, or any of them, or remove the same or any part thereof out of the county,” without the consent of the plaintiff, the plaintiff might enter into the lands and premises where the goods were, and take possession of them, and sell them by public or private sale, and out of the proceeds pay himself all sums which might then be due on the notes, and all expenses occasioned by John’s default to pay, or by his sale or removal of the goods, and pay the surplus to John: provided the plaintiff should not be obliged to sell the goods in case of default in payment of the notes, but he should be at liberty to take them and hold them without hindrance or interruption to his own use. And John covenanted to pay any deficiency there might be in case the full amount he owed were not discharged by a sale of the goods.

The affidavit of the plaintiff, as mortgagee, attached to the mortgage, was “that such mortgage truly sets forth the agreement entered into between me and the said mortgagor therein mentioned, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage; and that the said mortgage was executed in good faith, and for the express purpose of securing me, the mortgagee therein mentioned, against payment of the amount of such liability of the said mortgagor, by reason of the said three promissory notes therein mentioned, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such creditors from recovering any claims which they may have against such mortgagor.”

On the 11th of October the mortgagor made a voluntary assignment, under the Insolvent Act, to the defendant, an official assignee, who took possession soon after and sold the goods.

The question of *bona fides* was left to the jury, upon a charge more particularly stated in the judgment, and they found for the plaintiff and \$2079.20 damages.

In Michaelmas Term last *Harrison*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had :

1. For mis-direction of the learned judge, in not ruling that a verdict should be entered for defendant on the first count, as the plaintiff's evidence shewed that the goods were not in possession of defendant at the time of the action brought.

2. In refusing to direct the jury that the chattel mortgage under which the plaintiff claimed was void against defendant, who represented the creditors of John Mathers, the mortgagor, under the Consol. Stat. U. C. ch. 45. (a). Because the fifth section of that Act, under which the mortgage was drawn, contemplates only a concurrent or future liability or endorsement, while the evidence shewed, and it was recited in the mortgage, that the notes were in fact endorsed by plaintiff before the mortgage was made: (b). Because there was no recital in the mortgage of the terms, nature and effect of the agreement, or of any agreement between the parties to it, as and in the manner required by the statute, but only a recital of the fact that the notes had been endorsed: (c). Because the affidavit of the mortgagee was not in accordance with the statute, by not stating that the mortgage was made for the purpose of securing the mortgagee against the payment of his liability for the mortgagor, but of the liability of the mortgagor, and was otherwise incorrect and not according to the statute: (d). And because the affidavit was inconsistent with the mortgage, in referring to an agreement as set out therein, and the liability intended

to be created by such agreement, while the mortgage recited no such agreement or intended liability, but the fact that the notes had already been endorsed.

3. In refusing to tell the jury that the mortgage was void, at least as to part of the goods, as against defendant, because it did not contain a sufficient description to satisfy the provisions of the statute of the goods therein mentioned, or of a great part thereof, in this: (a). That as to household furniture, the situation of the house was not sufficiently described: (b). As to the bay mare and following goods, down to the store goods, there was not sufficient description of the premises therein mentioned: (c). And as to that portion of the goods mentioned as being part of the stock in trade of the mortgagor taken on the 9th of April, 1867, there was no sufficient description thereof in the mortgage, it not being stated in it where such goods were at the time of the mortgage.

4. In not telling the jury that the special replication was not proved, for that there was no evidence of notice to or knowledge by the assignee of the chattel mortgage before or at the time of the assignment, as alleged in the replication.

5. In refusing to direct the jury that the notes having been in fact endorsed by the plaintiff before the mortgage was given, and it being so recited in the mortgage, the mortgage was void on the facts admitted by the pleadings and appearing by the evidence and in the mortgage itself, under the Insolvent Act of 1864, sec. 8, sub-sec. 4, and other sub-sections.

6. In refusing to rule that at all events the mortgage was void as to all the other goods included in it beyond those purchased from Moffatt, Murray & Co., by the endorsed notes.

7. In ruling that there was sufficient evidence to go to the jury that the goods mentioned in the mortgage were in fact taken possession of by defendant, whereas there was no sufficient evidence of that fact.

8. In refusing to tell the jury that if as a matter of fact

the notes were endorsed before the agreement between John and William Mathers was in fact signed, the verdict must be for defendant.

9. And because he ought not to have told the jury, as he did, that very likely the agreement was signed first, as the evidence inclined the other way, and the recitals in the agreement itself shewed that the notes had then been endorsed.

10. And also on the ground that the verdict was contrary to law and evidence, for the various reasons aforesaid taken as grounds of mis-direction, and ought to have been rendered for defendant generally, or at all events on the first count, as the plaintiff's evidence shewed the defendant had not possession of the goods at the time of the bringing of the action.

11. And in that there was no sufficient evidence that defendant ever took or got possession of the goods described in the mortgage, or at least the greater part of them.

12. And in that the evidence and recitals in documents filed at the trial shewed that the notes had been endorsed by plaintiff before the giving by John Mathers of the mortgage, or of any valid agreement therefor.

13. And that upon the pleadings and evidence it sufficiently appeared that John Mathers was insolvent at the time he gave the mortgage, and that he gave the same in contemplation of insolvency.

14. And that there was also evidence from which a jury might have inferred knowledge thereof by plaintiff.

15. And on the ground that the damages were excessive and not warranted by the evidence, in that it was not shewn the defendant ever got goods which were included in the mortgage of a value equal to the amount of the verdict, but, on the contrary, it appeared that the greater part of the goods purchased from Moffatt, Murray & Co., (which alone of the store goods were clearly proved to have been in the mortgage) were in fact disposed of before the defendant became assignee or took possession.



16. And that the jury ought at least to have allowed the rent, insurance, and taxes paid out of the proceeds by defendant.

In this term *Galt*, Q. C., and *McMichael* shewed cause. As to the alleged insufficient description of the goods, the cases of *Harris v. The Commercial Bank*, 16 U. C. R. 437, and *Rose v. Scott*, 17 U. C. R. 385, put that beyond a doubt. A preference means a fraudulent preference, and none such was proved here : *Bank of Australasia v. Harris*, 6 L. T. N. S. 115, 8 Jur. N. S. 181 ; *Mercer v. Peterson*, L. R. 2 Ex. 304. The mortgage recites the facts truly, and these facts and the affidavit are not open to the objections which were raised : *Boulton v. Smith*, 17 U. C. R. 400 ; *Valentine v. Smith*, 9 C. P. 59 ; *Baldwin v. Benjamin*, 16 U. C. R. 52.

*Harrison*, Q. C., contra.—The agreement of the 14th September was not recited in the mortgage professed to have been given upon it. The mortgage was not valid under the 5th section of the act. *Liability*, as used there, means *future* liability. The liability here preceded the giving of the mortgage, and the recital does not shew the fact. The agreement should have been fully set out in the mortgage : *Turner v. Mills*, 11 C. P. 366. The affidavit is defective. It states that the mortgage was made to secure the mortgagee against the liability of the mortgagor instead of his, the mortgagee's, own liability : *Harding v. Knowlson*, 17 U. C. R. 564 ; *Mason v. Thomas*, 23 U. C. R. 305 ; *Jackson v. Kassel*, 26 U. C. R. 341. The house in which the furniture was, was not sufficiently described : *Howell v. McFarlane*, 16 U. C. R. 469 ; *Wilson v. Kerr*, 17 U. C. R. 168 ; *Hutchison v. Roberts*, 7 C. P. 470 ; *Haworth v. Fletcher*, 20 U. C. R. 278 ; *Kingston v. Chapman*, 9 C. P. 130. The goods in the mortgage, beginning with the clause "also the following goods," &c., are not described by locality or otherwise. The mortgage was of all the debtor's goods, and was an act of insolvency : *Wilson v. Day*, 2 Burr. 827 ; *Newton v. Chantler*, 7 East 138 ; *Stewart v. Moody*, 1 Cr. M. & R. 777, 5 Tyr. 493 ; *Siebert v. Spooner*, 1 M. & W. 714 ; *Smith v. Cannan*, 2 E. & B. 35 ; *Stanger v. Wilkins*, 19 Beav. 626 ;

*Ex parte Bailey*, 3 DeG. M. & G. 534; *Ex parte Bland*, 6 DeG. M. & G. 757; *Young v. Fletcher*, 3 H. & C. 732; *Johnson v. Fesenmeyer*, 25 Beav. 88: S. C. in appeal, 3 DeG. & J. 13; *Goodricke v. Taylor*, 9 L. T. N. S. 604, 10 L. J. N. S. 113, 10 Jur. N. S. 414; *Woodhouse v. Murray*, L. R. 2 Q. B. 635, *Weekly Notes*, 5th Dec'r, 1868, p. 288; *In re Smith*, 1 Bank'cy & Insol'cy. Rep. 264. An advance of goods or money is no answer if the act itself be one of insolvency: *Worseley v. DeMattos*, 1 Burr. 467; *Lindon v. Sharp*, 6 M. & G. 895; *Graham v. Chapman*, 12 C. B. 84; *Ex parte Harvey*, 1 Bank'cy cases, 194; *In re Halloway*, Ib. 244. As to advances under the Statute of Elizabeth: *Corlett v. Radcliffe*, 4 L. T. N. S. 1; *Doe Grimsby v. Ball*, 11 M. & W. 531; *Billiter v. Young*, 6 E. & B. 17; 1 *Smith's L. C.*, 5th ed., 21, *Twyne's case*; *Ex parte Ashley*, 2 Bank'cy cases, 124.

ADAM WILSON, J., delivered the judgment of the court.

The statute provides, that in case of a mortgage of goods and chattels for securing the mortgagee against the endorsement of any promissory notes, or other liability incurred by him for the mortgagor, and in case the mortgage is executed in good faith, and sets forth fully by recital or otherwise the terms, nature, and effect of the agreement, and the amount of liability intended to be created, and in case such mortgage is accompanied by affidavit of the mortgagee stating that the mortgage truly sets forth the agreement between the parties, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage, and that such mortgage was executed in good faith, and for the express purpose of securing the mortgagee against payment of the amount of his liability for the mortgagor, &c., the same shall be valid.

We think there can be no doubt that the words "for securing the mortgagee against the endorsement of any bills or promissory notes, or any other liability by him incurred for the mortgagor," cannot apply to a liability to

be incurred, nor, we think, to notes *to be* endorsed. The language is applicable to a past as well as to a concurrent endorsement or liability: *Turner v. Mills* (11 C. P. 366). If the statute did not extend to past endorsements, it would follow that mortgages given for such liabilities required no special recital, nor any affidavit by the mortgagee, nor registration, to give them effect, not that they would be void: *Baldwin v. Benjamin* (16 U. C. R. 52).

The recital in the mortgage is sufficient according to the statute. It states the terms, nature and effect of the agreement, and the amount of liability intended to be created. It states the endorsement of the three notes for certain specified sums, for the accommodation of the mortgagor, payable at certain specified dates, and that for indemnity therefor the mortgagor should give and did give the security in question. Nothing more than this can be required; nothing more could be stated, because nothing more than this is ever agreed upon or provided for.

The affidavit of the mortgagee that "the mortgage was made for the purpose of securing him against the payment of the amount of such liability *of* the mortgagor by reason of the said promissory notes," instead of *for* the mortgagor, raises an embarrassing question. The desire no doubt is to sustain the mortgage against such an objection if it can be reasonably done, but this cannot be done in contravention of any rule, or against that which may be the proper construction, in case there should be an irreconcilable and material difference between the two expressions.

It does appear that this liability *of* the mortgagor is and was a liability *for* the mortgagor, because the words are "for the purpose of securing *him*" (the mortgagee) "against the payment of such liability of the mortgagor by reason of the said notes." Now securing the mortgagee against the mortgagor's liability by reason of notes made by the mortgagor and endorsed by the mortgagee, shews, though not in the direct language of the act, but still in a most unmistakable manner, that the security *to* the mortgagee was against his liability for the mortgagor. We think this



equivalent language may be received instead of the plainer language of the statute. The affidavit is not open to any other exception.

Then as to the description of the goods. The household furniture is described as being in the dwelling house of the mortgagor, situate on Queen Street, in Brampton. This description is sufficient: *Harris v. Commercial Bank* (16 U. C. R. 437); *Rose v. Scott* (17 U. C. R. 385); *Fraser v. The Bank of Toronto* (19 U. C. R. 381); *Hiscott v. Murray* (12 C. P. 315).

The second parcel of property is described as one bay mare, &c., "being on the premises of the party of the first part, on said Queen Street," the premises before mentioned being Queen Street in the town of Brampton. This according to the authorities is also a sufficient description.

The third parcel of goods is of that part of it described above, commencing "also the following goods, being of the stock-in-trade of the party of the first part, taken in the month of April last, that is to say, sixteen pieces of tweed," &c. If this part can be connected with the preceding section, "also the following goods, being in the store," then it is clearly well described; but the heading of the part which describes certain of the goods as being in the store of the mortgagor, and which portion of goods is well described, is three pages distant from the part objected to relating to it as stock taken in April last.

We think it is doing no kind of violence to the construction of the mortgage to read, after the description of those goods which are well conveyed as being in the mortgagor's store, on Queen and Main Streets, in Brampton, the part objected to beginning, as before stated, "and also the following goods, being of the stock-in-trade of the party of the first part taken in April last," as being also in the store of the mortgagor; in which case, according to the decisions, they were well described according to the statute.

But how locality given to sixteen pieces of tweed, &c., can ever constitute "such sufficient and full description thereof that the same may be thereby readily and easily known and



distinguished," I have never been able to comprehend : see *Mills v. King* (14 C. P. 223). If this language is construed to relate to the time when the assignment is made, it has then a precise and appropriate meaning as to all goods ; but if it is to be referred to all future time so long as the assignment remains in force, it is impossible it can be applied in many cases, and it is useless and nonsensical when it is attempted to apply it to goods which are to be sold from day to day, as in this case, by the mortgagor.

The language used in *Jarman v. Woolton* (3 T. R. 618, 622-3) as to a schedule, is appropriate here as applied to locality. Lord Kenyon, C. J., said : "For a schedule conveys no information to the rest of the world. If it were annexed to the settlement its existence would only be known to the parties interested in it ; and therefore such a transaction as this would be equally open to fraud if there had been a schedule of this furniture as it is now.

\* \* And at the trial the furniture claimed as the wife's property was fairly identified." Buller, J., said : A schedule "is unnecessary, considering the nature of the property. It was not always to remain in the same state. The very object of the settlement was that the wife should sell the goods," &c.

The objection fifthly above mentioned, as to the notes having been endorsed before the mortgage was given, has been disposed of already.

The sixth objection has also been considered.

The seventh objection is not maintainable, for it was expressly proved the defendant took possession of the goods in the store, and sold them by Mr. Graham, the former clerk of the mortgagor, for about three weeks, and that the defendant sold the rest by auction. Other witnesses spoke to the same effect.

The eighth objection has already been considered.

The ninth objection is not a ground of objection at all. The learned judge might well have said what he is reported to have said, if he still left the question for the jury to determine, and it is not said that he did not : *Greenough v. Parker*, 4 L. T. N. S. 473. But whether he did or not is really of no moment, as our

opinion is a mortgage may be given to secure endorsements previously given, and especially so when the endorsement was made, as the facts shew, on the express condition that the mortgage should be given. The evidence shewed the notes and agreement were made on the same day.

The 10th, 11th, and 12th objections are mere repetitions for a new trial of those which were taken for misdirection.

The fifteenth objection, as to damages, was one for the jury. The case was one of difficulty, but the difficulty could have been cleared up by the defendant if he had produced the account of his sales.

This leaves the 1st, 4th, 13th, 14th, and 16th objections still to dispose of. As to the first objection, it was not necessary the goods should have remained in possession of the defendant at the time the action was brought. If the party once had them, but improperly parted with them before the action, he is liable for their detention : *Jones v. Dowle* (9 M. & W. 19.)

The fourth objection seems to us not at all material, for whether the defendant had notice or not of the plaintiff's claim at the time of the voluntary assignment being made to the defendant, will make no difference as to the legal title to the goods. If the plaintiff's title be a valid one it must prevail against the defendant whether he knew of it or not; if it be not a valid title, then the defendant is entitled to recover.

As to the thirteenth and fourteenth objections. The learned judge directed the jury to say "whether the chattel mortgage was arranged for or given to serve any fraudulent purpose whatsoever, such as delaying or defeating creditors, or in contemplation of insolvency, &c., and if they found it was given *bond fide* for the purpose represented by the plaintiff, to find for him."

The jury found for the plaintiff upon the facts, and the court had before that found for the plaintiff on the pleadings.

The case of *Mercer v. Peterson* (L. R. 2 Ex. 304), and many others, support such a transaction as this against the general body of creditors when honestly entered into, —and the honesty of this has been sustained by a jury.

As to the last objection, the sixteenth on the list, we think rent, insurance, and taxes, for which the goods were liable at the time when the defendant took possession of them, should be allowed by way of deduction, but if the rent were not due at that time it should not be deducted;—so if no insurance were effected before that time, or if it were and was maintained by the defendant after he took possession, it should not be allowed; and if the taxes were not then due and payable, they should not be deducted: *Morgan v. Powell* (3 Q. B. 278), *Goldsmid v. Raphael* (3 Scott 385), *Whitworth v. Maden* (2 C. & K. 517). We cannot make out how the facts are as to such items. It appeared, however, the defendant sold plenty of goods over and above the plaintiff's verdict, and therefore no deduction from it should be made.

The rule should be discharged.

*Rule discharged.*

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## PENTON V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

*County Court appeals—Objections to bond, &c.—R. W. Co.—Liability for loss of luggage.*

This court will not entertain objections to the hearing of County Court appeals, unless such objections appear or should properly appear upon the proceedings certified. They refused therefore to strike out an appeal entered, for objections to the form and amount of the bond, and to the sufficiency of the sureties and the affidavits of justification. Where defendants moved for a nonsuit on leave reserved, or for a new trial, and the rule was made absolute for a new trial on payment of costs: *Held*, that they might appeal from this decision as refusing the nonsuit, and need not first take out the rule absolute as granted. The plaintiff was a passenger on defendants' railway from Paris to Seaforth, with two trunks, for which he had checks. At Seaforth the trunks were put on the platform, and he assisted defendants' servant to carry them into the baggage room, and went up in an omnibus to the hotel; this was about 3, p.m. In the evening, about 8, he sent his checks for the trunks, but one of them had disappeared, and the evidence went to shew that it had been stolen: *Held*, that defendants were not responsible: that their duty as common carriers ended when the trunk had been placed on the platform and the plaintiff had had a reasonable time to remove it, as he clearly had here. A nonsuit was therefore ordered.

APPEAL from the County Court of the county of Huron.

The appeal was entered, and *Harrison*, Q. C., in the Practice Court, obtained a rule calling on the defendants to shew cause why the appeal should not be set aside and struck out of the paper, with costs, on the following grounds :

1. That the rule *nisi* of the appellants was not discharged in the court below, but was made absolute, and no rule absolute was taken out or served before the entry of said appeal in this court.

2. That even if such rule absolute had been taken out and served, the appellants cannot properly appeal against the decision in their own favour, granting one of the alternatives mentioned in the rule *nisi*.

3. That if the appellants are dissatisfied with the decision of the judge as to costs of the new trial, such decision as to costs is not properly the subject of an appeal.

4. That the defendants are no parties to the bond for appeal, and such a bond is not therefore such as the statute requires

5. The bond is not sufficient in form, it being only a security for the costs of the suit and of appeal, and not for the damages recovered by the plaintiff.

6. That the recitals in the bond are untrue, in this, that the rule *nisi* was not discharged, and it is not correctly described in the bond.

7. That the sureties to the bond have not justified in like manner as bail are required to justify, and no notice was given to plaintiff of the intention to give such bond or to justify.

8. That one of the sureties is a practising attorney of this court.

9. That the affidavits of justification are insufficient in substance and form; it is not stated therein that the sureties are worth property to double the amount of the security, and that they are not bail or security for any other person; and it is in other respects defective.

10. That said bond and affidavits were approved by the judge, on production, without notice to plaintiff, or an opportunity to shew cause, and without the production of



an affidavit of the due execution of the bond at the time of approval.

This rule was argued in the Practice Court by *McMichael*, for the defendants, and *Harrison*, Q. C., for the plaintiff; but as the decision of the full court, in *Pentland v. Heath*, 24 U. C. R. 464, was brought in question on the principal ground argued, the rule was made returnable in the full court.

*McMichael* now shewed cause. The question is, is it necessary the appellants should have been parties to the appeal bond? The Consol. Stat. U. C. ch. 15, sec. 68, provided that "in case the party wishing so to appeal gives security to the opposite party by a bond executed by himself and two sureties," &c. There would have been no doubt under that enactment that the bond executed by the two sureties only would have been insufficient. The statute seems to have been construed as applicable only to the actual parties to the record, and as excluding parties beneficially interested as plaintiff or defendant. The 27 Vic. ch. 14, sec. 2, then provided that the words "party wishing so to appeal" shall for all purposes be taken and held to mean as well parties suing in the names of others though not named in the record, as parties so named, and the words "himself and" between the words "by" and "two" shall be struck out of the said 68th section. But a further difficulty arose, for the words "as well parties suing in the names of others" were held to apply to beneficial plaintiffs, and to exclude beneficial defendants, and to create other doubts: *Tozer v. Preston*, 23 U. C. R. 310; *Pentland v. Heath*, 24 U. C. R. 464; *Darling v. Sherwood*, 2 U. C. L. J. N. S. 130. And the act was again amended by the Law Reform Act of 1868, 32 Vic. ch. 6, sec. 5, in this respect, and which also re-enacts the exclusion of the words "himself and," as had been provided for by the 27 Vic. ch. 14. The 68th section then as amended, and as applicable to this bond, reads thus: "In case the party wishing to appeal gives security to the opposite party by a bond executed by two sureties," &c. So that it was

not necessary the defendants should have executed the bond at all.

*Harrison*, Q. C., supported the rule, and referred to and commented on the cases already quoted, and cited others, which do not become material.

The case was then argued on the merits.

The declaration contained three counts—1. For not carrying plaintiff and his luggage safely from Paris to Seaforth, and delivering his luggage to him within a reasonable time after his arrival at Seaforth.

2. For non-delivery of goods by defendants, which had been delivered to them to keep and re-deliver on request.

3. For conversion of property.

Pleas. 1. To first count, that defendants did safely carry the luggage from Paris to Seaforth, and they had the same ready to deliver to plaintiff, as plaintiff well knew, but plaintiff left the railway train at Seaforth without calling for the luggage or taking the same: that after waiting a reasonable time for plaintiff to call and take away the luggage, and plaintiff not having within said time called for or taken the luggage, the defendants stored the same in a storehouse or baggage room of defendants, which was a reasonably secure place to put and keep the same in, and where the defendants had kept goods of their own, and without any charge to the plaintiff the defendants kept and stored the luggage for plaintiff: that while the luggage was in the baggage room or storehouse waiting for plaintiff to call for the same, and after the carriage thereof was ended, the luggage was feloniously stolen from the said premises, and the plaintiff did not until after the same was stolen call for or demand the same: that the felony was not committed by defendants' servants or agents, nor through their default: that afterwards a portion of the luggage was found and delivered to the plaintiff: that the plaintiff did not use due care in calling for and taking away the luggage on its arrival at Seaforth, and had he then called for and demanded the same,—being upon the same train as that on which the plaintiff was carried to Seaforth,—he

could have received it, and would not have sustained any loss.

Second plea, like the preceding one, to the second and third counts.—Issue.

The evidence at the trial shewed that the plaintiff was a passenger by the train from Paris to Seaforth, on Saturday the 22nd of February, 1868 : that his luggage came safely to Seaforth, and was put on the platform, and he helped the baggage master to carry it into the defendants' station baggage room that day about 3, P.M., at Seaforth, and that he left it there because he said there was no omnibus at the station to carry it away. The omnibus, however, was proved to have been at the station just a little after the cars had moved off, and the plaintiff rode up in it, but had no luggage with him. He shewed his luggage checks in the hotel at Seaforth that night about eight o'clock, and he gave them to a person in the employ of the hotel keeper about nine that night, who sent them down by the driver of the omnibus that night, who enquired for the luggage, but was told there was one trunk, which he got, but that there was not a second trunk.

On Monday, 24th of February, the plaintiff demanded his missing trunk from the baggage master, who said he did not know what had become of it. The rule was, on the arrival of a train to put the baggage on the platform, and if not claimed in a short time, to move it into a room. A man waits at the station on the arrival of a train to deliver the luggage to the owners. The trunk must have been stolen. It was found some weeks after at Clinton, but nothing was in it ; it had been broken open. Some of the contents of the trunk also were brought back, but not with the trunk ; these articles were given to the plaintiff ; the trunk was broken to pieces. There was no safer place the trunk could have been at the station than where it was. The room should always be locked, except when some one was in it : no charge was made for storing luggage. The luggage room was locked after the

luggage was put in, and the trunk was in the room as late as five or six o'clock, that Saturday night; the door was then locked by the baggage master when he left the station. The trunk was then in the baggage room. The trunk was first missed about 9:30, that night.

The jury found a verdict for the plaintiff, and \$57.20 damages.

Defendants in the ensuing County Court Term obtained a rule calling on the plaintiff to shew cause why a non-suit should not be entered, pursuant to leave reserved, because the evidence shewed the defendants had fulfilled their duty as common carriers when they brought the plaintiff as passenger with his luggage to Seaforth, and placed the luggage on the platform at that station ready for his use if and when he desired it; and the defendants were not liable as common carriers to take charge of the trunk: that the plaintiff should have taken his trunk away, and not left it at the station;—or why a new trial should not be granted on these grounds, and also for the misdirection of the learned judge, in not telling the jury there was no evidence to charge the defendants as common carriers, and in leaving the question to them whether the plaintiff had not a reasonable time to take away the trunk, there being no averment of a want of reasonable time, the only averment being that the defendants should have delivered within a reasonable time, and the evidence shewed they were ready to do so within such a reasonable time.

After argument, the rule was made absolute for a new trial on payment of costs by the defendants. The learned judge stated his opinion as follows:—"I am of opinion that the defendants had discharged their functions and duty as carriers when they carried the plaintiff and his trunks to Seaforth, and laid the trunk on the platform at that station ready for actual delivery to the plaintiff; and that when the officer or servant of the defendants, at the request of the plaintiff, and with his assistance, took the trunk and placed it in the defendants' baggage room at the station, the defendants no longer had charge of the trunk as carriers, but in a new



and different capacity. The rule was also moved on the ground of misdirection and omission to direct the jury at the trial on certain grounds. Those grounds of objection were not taken at the trial, and therefore I am not bound to entertain them now; but without expressing acquiescence in or dissent from these grounds of objection, I have not wholly discarded them in considering the form in which the rule should be made absolute. I think the rule should be made absolute for a new trial, but upon payment of costs."

The defendants appealed against this decision, on the ground that the learned judge should have made the rule absolute for a non-suit: that the defendants' duty as common carriers ended when they brought the trunk with the plaintiff as passenger to Seaforth, and placed it on the platform at the station ready for delivery, and those facts having been proved, the plaintiff should have been non-suited: that no duty was cast on defendants as common carriers to take care of the trunk afterwards, nor were they as common carriers liable therefor; and that the evidence did not sustain the declaration.

*McMichael* supported the appeal, contending that the defendants' duty as common carriers had determined when the trunk was put on the platform for delivery, or at any rate when the plaintiff himself helped to put it in the defendants' baggage room: *Shepherd v. The Bristol and Exeter Railway Company*, L. R. 3 Ex. 189. This appeal is not for costs only. The defendants do not desire a new trial at all, and although they have asked for it, they may appeal if they have wrongly been denied the nonsuit to which they were entitled: *Parker v. Cathcart*, 17 Ir. C. L. Rep. 778. And this court will give such judgment as ought properly to have been given: *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316.

*Harrison*, Q. C., contra.—The appeal book shews that no rule has been drawn up granting to the defendants a new trial on payment of costs. The judge below has

pronounced an opinion on the rule to shew cause, directing that the rule should be made absolute to a certain extent, and that rule should have been drawn up before the appeal was brought. The defendants cannot appeal from the decision granting them a new trial, because they asked for it. Their appeal is therefore in effect against the costs of the new trial, and costs alone do not form the subject of appeal : *Carr v. Stringer*, E. B. & E. 123. The declaration was proved. The defendants' liability as common carriers was not determined till after the goods had reached their destination, and for a reasonable time after it, and the plaintiff demanded his trunk the same night, which was a reasonable time after its arrival : *Bourne v. Gatliffe*, 3 M. & G. 643 ; *Raphael v. Pickford*, 5 M. & G. 551 ; *Hyde v. The Navigation Co. from Trent to Mersey*, 5 T. R. 389 ; *Muschamp v. The Lancaster, &c., R. W. Co.*, 8 M. & W. 421 ; *Pickford v. The Grand Junction R. W. Co.*, 12 M. & W. 766 ; *Machu v. The London, &c., R. W. Co.*, 2 Ex. 415 ; *Richards v. The London, Brighton, &c., R. W. Co.*, 7 C. B. 839 ; *Butcher v. The London & South Western R. W. Co.*, 16 C. B. 13 ; *Gamble v. Great Western R. W. Co.*, 24 U. C. R. 407 ; *Le Conteur v. The London and South Western R. W. Co.*, L. R. 1 Q. B. 54. The reasonable time was a question for the jury : *Hughes v. The Great Western R. W. Co.*, 14 C. B. 637 ; *Taylor v. The Great Northern R. W. Co.*, L. R. 1 C. P. 385 ; *Wood v. Crocker*, 18 Wisconsin 45 ; *Redfeld on Railways*, 3rd ed., Vol. II., pp. 50 to 64 ; *Smith v. Nashua and Lowell R. W.*, 7 Foster, 86.

*McMichael* in reply.—Reasonable time does not arise, for the plaintiff helped to remove his trunk into the defendants' baggage room to be kept for him. Defendants were not after that common carriers : *Bowie v. The Buffalo, Brantford and Goderich R. W. Co.*, 7 C. P. 191 ; *O'Neill v. The Great Western R. W. Co.*, 7 C. P. 203 ; *Inman v. The Buffalo and Lake Huron R. W. Co.*, 7 C. P. 325. As to the right of appeal on the case as it stood, and where an alternative of the rule has been refused to appellant : *Abbott v. Feary*, 6 Jur. N. S. 1099, 29 L. J. Ex. 475, 6 H. & N. 113.

ADAM WILSON, J., delivered the judgment of the court.

I could not call to mind, during the argument on the respondent's rule to set aside the appeal, the name of the case in which I had considered the propriety of raising such objections in this court, although I was sure some such case had been before me, and had been decided upon the grounds I had supposed. I have since found the case. It is *McLellan v. McClellan* (2 U. C. L. J. N. S. 297), decided in the Practice Court in Easter Term, 1866. The conclusion to which I came was, "that the appellate court has nothing to do with the facts or proceedings prior to the judge's certificate; these are all matters to be transacted in and dealt with by the court below, and all the appellate court has to do is to decide upon the proceedings actually transmitted and certified." And the reason is because our statute, differing from the English act in that respect, "makes all these acts conditions precedent only to the judge of the court certifying the case; and when he certifies it the court above is authorized, and, I am inclined to think, compelled to act upon the case so certified."

I was aware then, and am now, that the decisions have not proceeded upon such a view of the statute, but it appeared to me then, and it appears to me still, that it is the proper construction to place upon the statute.

It never was intended we should entertain the numerous technical exceptions which may always be raised on such an occasion. They are all concluded, so far as we are concerned, by the judge's certificate, for we must presume he will not grant it unless everything has been regularly done in the court below.

But even if there should be these practical objections, and the judge has wrongly disregarded them, it does not follow that we are to entertain them, or to review them if he has decided upon them. The judge's certified case is all that we have to look to, and all that we can or ought to be required to consider.

I gather this was the view Sir John Robinson, C. J., took of the statute, for in *Haworth v. Fletcher* (20 U. C. R.

280) he said : " As to the appeal being shut out by the want of giving a bond in time, we see no statement of facts as to the time of giving the security for the purpose of appeal, but it is evident that the appeal must have been entered in the first term of this court after the judgment, *and that is all we know judicially of the matter.*"

This enables all but the first, second and third grounds of the rule to be disposed of without further enquiry. As to these grounds they are available still to the plaintiff, for they all appear upon the appeal book, or they can be raised by that which is not there but which it may properly be contended should have been there.

The first ground is, that no other rule than the rule *nisi* was taken out or served, and that a rule absolute was ordered, which rule absolute, being the basis of appeal, should actually have been drawn up and returned ; and as it does not appear to have been taken out or drawn up by the defendants, their appeal is imperfect and invalid.

The defendants' counsel contended that their appeal is from the decision of the judge, and if they had drawn up the rule it would have been an acceptance of the terms of it by them, and have precluded their appealing from it.

In order to determine this question it is necessary to define what it is the defendants have appealed from. They applied for a nonsuit or new trial, and they got a rule *nisi* on the grounds before stated. The judge's decision was that there should be a new trial on payment of costs by defendants, which was in effect discharging the rule as to the nonsuit.

The defendants complain of the judge's decision in directing the rule to issue for a new trial instead of for a nonsuit, and they decline to take or draw up such a rule as the judge has directed.

The 67th section of the County Courts Act, Consol. Stat. U. C. ch. 15, enacts, that in case any party to a cause in any of the county courts " is dissatisfied *with the decision of the judge* upon any point of law," &c., he may appeal. In case of an appeal the judge is to certify the pleadings



“and all motions, rules or orders made, granted or *refused therein*, together with his own charge, judgment or decision thereon;” and the court appealed to shall give such order or direction to the court below touching the judgment to be given in the matter, as the law requires; and upon receipt of such order, direction, and certificate, the judge of the court below shall proceed in accordance therewith.

The plaintiff had no power to take out this rule for the defendants. The defendants would not take it out because they excepted to it. The rule, as appears from *Abbott v. Feary* (6 H. & N. 113), has neither been made absolute nor discharged. The rule absolute was really *refused* in the terms of the rule *nisi*, though not refused *simpliciter*.

In England, on appeals from the County Court, it is stated in *Ch. Arch. Prac.* 11th ed. 1719, “the case should not set forth the reasons given by the judge for his decision, nor the observations which he may have made by way of foundation for his judgment.” Our statute plainly requires more than the English act does, for he is expressly required to give his own charge, judgment or decision; not merely the formal judgment, but *his own charge or decision*.

We have his decision, and the defendants are dissatisfied with it, and if we should be so too we are to give such direction touching the *judgment to be given* as the law requires.

In *Levy v. Green* (1 El. & El. 969), the Court of Queen’s Bench was equally divided, and the rule dropped as to a nonsuit, but the case was appealed to the Exchequer Chamber, because, we suppose, the court had *refused* the rule. See also *Barstow v. Reynolds* (2 Jur. N. S. 790).

We think, on the whole, though not without some doubt, that the defendants were right in appealing from the decision of the judge, who refused to make the rule absolute in the manner they had contended for.

It is said the court may remit the case to be amended, and perhaps this might have been ordered if we had been of opinion the rule, as directed by the judge, should have been drawn up: *The Yorkshire Tire & Axle Co. v. The*

*Rotherham Board of Health* (27 L. J. C. P. 235); *Great Northern R. W. Co. v. Shepherd* (21 L. J. Ex. 114).

The second objection has been partly considered already. It is the principal matter which is treated in the case of *Abbott v. Feary*. Some of the judges were in doubt whether a rule neither discharged nor made absolute, but granted, as was done here, for one of the matters which the party had applied for, was within the provisions of the English act, which gave an appeal when the rule was discharged or made absolute.

Our own statute is differently worded, and we think an appeal does lie for not granting the rule absolute for a nonsuit, in case it appears plainly the defendant was entitled to it, although that branch of the rule was made absolute for a new trial.

If the case shews there was a fair question for the jury, and that the learned judge was not in law obliged to grant a nonsuit, we should certainly not interfere with his discretion in refusing it but in giving a new trial.

The facts here are not disputed. A new trial can never alter the matter. The case as it now stands enabled the judge to apply the law directly to the facts, and to determine the rights of the parties at once. The case does not seem a fit one for a new trial; it must be time and expense lost. The same facts must appear again, and perfectly without dispute, and the same motion must be made again for a nonsuit. The learned judge should therefore have made the rule absolute for a nonsuit or have discharged it entirely.

The third ground is not sustainable, for the appeal is not respecting the costs; it is against there being a new trial, and because a nonsuit was not ordered.

The legal question then is: Is the plaintiff entitled to a verdict upon the undisputed facts of the case? If he is not, then the defendants are entitled to have a nonsuit entered.

It is undisputed that the plaintiff travelled by the defendants' cars from Paris to Seaforth as a passenger, with two

trunks, which were checked to Seaforth, and that the plaintiff and his trunks safely reached Seaforth. The trunks were put from the train on to the station platform; the plaintiff did not take them away. After lying on the platform for a while they were moved by the defendants' servants into the station baggage-room, the plaintiff himself helping to remove them. This was about three in the afternoon. The baggage-room was said to have been locked from 6, P.M. till 9.30, P.M., when the plaintiff sent for his trunks. The trunks were said to have been all safe in the baggage room at 6, P.M. At 9.30, P.M. one trunk was gone, which is the subject of this action, and it is said to have been feloniously stolen. The evidence leads to that conclusion, and it is not disputed. The question then is, had the defendants possession and care of the plaintiff's trunk as common carriers from the time the plaintiff helped to convey it into the baggage-room at the station, shortly after 3, P. M., until the time it was supposed to have been stolen, between six and nine o'clock that night?

If they had, the defendants are liable for the loss. If they had not, but they held it as warehousemen, the plaintiff must fail.

The second count, of a bailment for reward, was not proved; the count in trover was not proved either. The case depends entirely on the first count.

The case of *Shepherd v. Bristol, &c., R. W. Co.* (L. R. 3 Ex. 189), cited on the argument, shews that the duty of the defendants as common carriers had ended when the trunks were laid on the platform at Seaforth, and the plaintiff had a reasonable opportunity to take them away. This he did not do, but he had them put, and assisted in putting them into the company's baggage room at the station, where they remained for several hours without charge, entirely for his convenience.

There was no necessity for putting them into the baggage-room at all. The plaintiff himself rode up in the omnibus from the station to the hotel, and he could have taken his baggage with him, if he had desired to do so.

His helping to carry the trunks into the room shews such a possession by, and delivery to him as takes this out of some of the cases which were cited for the plaintiff.

The plaintiff was entitled to a reasonable time after the goods were put on the platform to call for and take them away. There is no room for doubting but that he had this full and ample reasonable time for the purpose, which takes this case from the effect of some other of the authorities relied on by the plaintiff.

There were no facts here which could make the case of *Butcher v. The London and South Western R. W. Co.* (16 C. B. 13), or the case in 7 C. B. 839, on which it was founded, applicable to it.

The case of *Inman v. The Buffalo, &c., R. W. Co.* (7 C. P. 325) is very applicable here.

The rule which should now be made is the rule which the learned judge should have made, from the opinion which he expressed, that the rule be made absolute to enter a nonsuit.

The appeal will therefore be allowed.

*Appeal allowed.*

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### MCGREGOR V. HUME.

*Insolvent Act of 1864—Sec. 8, sub-sec. 4—Fraudulent transfer.*

Knox being indebted to one Kyle, and Kyle to the defendant, it was arranged that defendant should take Knox as his debtor, defendant crediting Kyle with the amount which Knox owed to Kyle, and Kyle discharging Knox; and Knox accordingly gave defendant his note for the amount. This took place within thirty days before Kyle made an assignment in insolvency, and his assignee brought trover for the note, contending that the transaction was avoided by sec. 8, sub-sec. 4 of the Insolvent Act of 1864; but

*Held*, that he could not recover, for the note never was the insolvent's property, and so never passed to the assignee; and even if it was a transfer or payment by Kyle within the act, and so avoided, this would not entitle the plaintiff to the note.

APPEAL from the County Court of the County of Water-



loo. The action was one of trover, brought by the plaintiff as assignee of one Kyle, an insolvent, to recover damages for the conversion of a promissory note made by one Knox, payable to the defendant or bearer. The declaration also contained a count for money had and received, upon which nothing turned. The defendant pleaded not guilty, and that the note was not the property of the plaintiff.

It appeared from the evidence given on the trial that Knox, the maker of the note, was indebted to the insolvent in \$90: that the insolvent was indebted to the defendant in over \$100, and that Knox had a claim against the defendant: that the insolvent before his assignment had spoken to Knox about making a turn of their respective debts: that Knox saw the defendant on the subject, and it was arranged between the three, and carried into effect, that defendant should take Knox as his debtor for the amount Knox owed the insolvent, defendant crediting the insolvent with the amount of Knox's debt, and the insolvent discharging or crediting Knox with the amount he owed; and as arising out of this arrangement Knox gave to defendant his note, the one in question. Defendant afterwards sued the insolvent for the balance of his debt in the Division Court.

This transaction took place within thirty days before the insolvent's assignment, as the note was given on the 17th February, 1868, and the assignment by the insolvent was executed on the 26th February.

The learned judge in the court below held, and told the jury, that the note in question being given within thirty days before the assignment, the defendant by the arrangement made had a preference over the other creditors; and that the transfer, as it was termed by the learned judge, must be presumed to have been made in contemplation of insolvency.

The plaintiff had a verdict for the full amount of the note. A motion was made in the following term to set aside the verdict for misdirection and want of direction. A rule was granted and after argument discharged, and against that decision this appeal was brought.

*D. B. Read*, Q.C., for the appellant, cited *Mercer v. Peterson*, L. R. 2 Ex. 304.

*W. N. Miller*, contra.

MORRISON, J., delivered the judgment of the court.

It is unnecessary for us to notice the grounds of appeal taken, as our judgment proceeds upon one suggested by the members of the court during the argument; for we are all of opinion that this appeal must be allowed, as we cannot see that the plaintiff is entitled upon any ground to succeed in this action. The promissory note in question never was the property of the insolvent, and no ground has been shewn upon which it has become the property of the plaintiff as assignee, and unless he has a right to this note as belonging to, and forming part of the estate of the insolvent, he cannot recover in this action.

The only pretence under which the plaintiff seeks to recover is based upon the hypothesis that the arrangement made between the insolvent, the defendant and Knox, is void, and not binding between these parties, under sub-sec. 4 of sec. 8 of the Insolvent Act of 1864. That section enacts, "that if any sale," &c., "or transfer be made by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any goods, effects, or valuable security be given, by way of payment, by such person to any creditor, whereby such creditor obtains, or will obtain, an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee. \* \* And if the same be made within thirty days next before the execution of the deed of assignment, it shall be presumed to have been so made in contemplation of insolvency."

Assuming that the arrangement so made between these parties is one coming within the provisions of the 4th subsection, and that it involves a transfer or payment by the insolvent, which point we do not decide, then if the contention of the plaintiff is right, the transfer or payment is

null and void, and the subject thereof may be recovered back. Can it be said that this note is the subject of the transfer or payment made by the insolvent? If there was any transfer it was that of the *debt* due by Knox to the insolvent; and if, as argued for the plaintiff, it is void, Knox is still indebted to the estate. The note in question arose out of the assumed void transaction, and only furnishes evidence of the result of the arrangement between Knox and the defendant.

Suppose by the agreement made between the three that the debts were mutually extinguished, without the intervention of a note, could the plaintiff in that case sustain an action against this defendant for Knox's debt? We think not. We cannot see that Knox giving a note to the defendant makes any difference. It is evident that the giving of the note, as between Knox and the defendant, was merely as a memorandum of the amount that defendant was to credit Kyle on Knox's claim against the defendant in a settlement of their accounts. It was pressed on us that as the ground upon which our judgment rests was not taken at the trial or in the court below, we should not give effect to it. As a general rule, that is the practice in cases where the plaintiff has a cause of action upon which he is entitled to succeed; but in a case like the present, where it is shewn that the plaintiff has no cause of action, we would not be justified in allowing the verdict to stand. The appeal must be allowed, and the rule be absolute for a new trial in the court below.

*Appeal allowed.*

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## GILBERT v. McANNANY ET AL.

*Mining Co.—C. S. C. ch. 63, sec. 57—Bills of Exchange.*

A mining company incorporated under Consol. Stat. C. ch. 63, sec. 57, has not, as a necessary incident, the right to draw, accept or indorse bills of exchange for the purposes of their business; and the power of "selling or otherwise disposing of their ores as the company may see fit" in their articles of association, will not give such right by implication.

Bills directed to the secretary of the company, and so describing him, are in effect drawn on the company, and authorize him to accept on their behalf, if he has authority to bind them; and it is unnecessary to put the seal of the company to the acceptance.

His authority, and the power of the company to accept, are put in issue by a traverse of acceptance by the company.

Where there is no mention in the bills or acceptances of the amount of the capital stock of the company, the trustees under Consol. Stat. C. ch. 63, sec. 57, are personally liable; but only where but for such omission the company would have been liable, which here they would not have been.

THE DECLARATION stated that the defendants were trustees of the Richardson Gold Mining Company, being a joint stock company formed under the 22 Vic. ch. 22, (Consol. Stat. C. ch. 63), and that the plaintiff, on the 19th February, 1868, by his draft directed to the company, required the company to pay to the order of the plaintiff at La Banque Jacques Cartier, at Montreal, \$800, two months after date; and that company, by James Glass, their officer and secretary, duly authorized, signed the draft as the acceptors thereof; and that the name and style of the company and the amount of the capital stock were not written or printed in letters at the head of the draft, in the manner required by the said act, and the draft has not been paid by the company nor by the defendants—wherefore the plaintiff sues the defendants, according to the form and effect of the statute.

There was a second count like the first, on a bill dated 21st February, 1868, at three months, for \$1785.

The plea, which was pleaded by the defendants separately, was, that the company did not, by James Glass their officer and secretary, duly authorized, or otherwise, accept the bills in manner and form alleged. Issue.



The trial took place before Richards, C.J., at Kingston, when a verdict was found for the defendants with leave to the plaintiff to enter a verdict for himself for \$2705.27, against all or any of the defendants.

The bills were drawn at Montreal, directed "To James Glass, Esq., Sect'y, Richardson Gold Mining Co., Belleville, Ont.," and across each was written, "Accepted—The Richardson Gold Mining Co., per J. Glass."

*Mackenzie*, Q.C., obtained a rule for the above purpose, on the ground that the plaintiff was entitled to succeed in law on the facts proved, and because the defendants could not raise the legal objections taken on the issue which was joined; or why a new trial should not be granted, as the verdict was contrary to law and evidence; or why a non-suit should not be entered.

In this Term *Bell*, Q.C., (of Belleville), shewed cause. The defendants, as individual shareholders of the Richardson Gold Mining Company, are sought to be made personally liable as acceptors of the bills sued on, because the bills have not the amount of capital stated at the head of the bills as required by the statute, Consol. Stat. C. ch. 63, sec. 57. The amount of capital is no part of the designation or description of the company, as the word *Limited* is under the Imperial Act, 25 & 26 Vic. ch. 89. The bills are drawn on James Glass, and not on the company, and the declaration has not been proved. There was no evidence either that Glass had power to accept. The defendants cannot be made personally liable on the bills by reason of the alleged defects in them, unless the company could have been sued on them in case they had been formally drawn and accepted: *Penrose v. Martyr*, 1 E. B. & E. 499; *Bank of Montreal v. Delatre*, 5 U. C. R. 362; *Nicholls v. Diamond*, 9 Ex. 154; *Owen v. Van Uster*, 10 C. B. 318; *Lindley on Partnership*, 2d ed., 348. The company, being one established for mining and not for trading purposes, had no power to accept bills at all: *Lindley on Partnership*, 2d ed., 272, 273, 355 to 373; *Bateman v. Mid-Wales R. W. Co.*, L. R. 1 C. P. 499; *Peruvian Railways Co.*, L. R. 2 Ch. App. 618; *Mare*

v. *Charles*, 5 E. & B. 978; *Bowes v. Hope Life Insurance, &c. Co.*, 11 H. L. Cas. 389; *Bult v. Morrell*, 12 A. E. 745.

*Mackenzie*, Q. C., supported the rule. There is no plea denying the drawing of the bills on the company. Glass had authority to accept bills for the company, and the company had the power to draw and accept bills, and such bills need not be under seal. He referred to *Kingston Marine R. W. Co. v. Gunn*, 3 U. C. R. 368; *Cumming v. Guess*, 2 U. C. R. 125; *Grant on Corporations* 61; *Mayor of Ludlow v. Charlton*, 6 M. & W. 823; *Murray v. East India Co.*, 5 B. & Al. 204; *Edie v. East India Co.*, 2 Burr. 1216; *Slark v. Highgate Archway Co.*, 5 Taunt. 792; *Broughton v. The Salford Water Works Co.*, 3 B. & Al. 1; *Lindus v. Melrose*, 2 H. & N. 293; *Edwards v. Cameron's Coalbrook, &c., R. W. Co.*, 6 Ex. 269.

ADAM WILSON, J., delivered the judgment of the court.

The section of the provincial act before mentioned requires that the name, style, and capital, shall be written or printed in letters at least as large and distinct as any other used in the same document, at the head of every promissory note, draft, check, order, bond, contract, agreement, bill of parcels, or other document, purporting to be made or signed by any trustee or officer of the company, or in any way to bind or oblige the said company; and the trustees shall be personally and jointly and severally liable for every contract, promise, or engagement, made in the name of the company, at any time when such name, style, and amount of capital stock, has not been so inscribed at any such place, or by virtue of any such document at the head of which the same has not been written or printed in the manner hereby required.

By the Imperial Act, 25 & 26 Vic. ch. 89, secs. 8, 9, all limited companies must in their articles of association "name the proposed company with the addition of the word *limited* as the last word in such name;" and secs. 41 & 42 enact that the company shall have its name engraven in legible characters on its seal, and mentioned in legible characters in all notices, bills of exchange, &c. And

if any director, manager, or officer of the company, or any person on its behalf, signs or authorizes to be signed on behalf of the company any bill of exchange, &c., wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of £50, and shall further be personally liable to the holder of any such bill of exchange, &c., unless the same is duly paid by the company.

The provisions of the two statutes are substantially alike, and were designed for the same purpose, to inform and caution the public that they were dealing with a company the shareholders of which were not liable for the debts or engagements of the company generally, but in a qualified manner and to a limited extent.

The two bills were drawn by the plaintiff payable to his own order, and directed to James Glass, Esq., Secretary, R. G. M. Co., Belleville, Ontario, and they were accepted as follows: "Accepted. The Richardson Gold Mining Co., pr. J. Glass, Secretary."

The case of *Bateman v. Mid-Wales R. W. Co.* (L. R. 1 C. P. 499) shews that a corporation empowered to build a railway cannot bind itself by accepting a bill of exchange, but a corporation established strictly for trading purposes, that is, to buy and sell, may become parties to bills.

A mining company has been held not to be a trading company for this purpose: *Dickinson v. Valpy* (10 B. & C. 128), and the case of the *Peruvian Railways Co. v. Thames and Mersey Marine Insurance Co.* (L. R. 2 Ch. App. 617) shews that a corporation formed under the Joint Stock Act of 1862, has not necessarily, as an incident under it, the power of accepting bills of exchange or of issuing negotiable instruments, but that question has to be determined on the proper construction of the memorandum and articles of association. It is said: "There may, under the act, be companies which communicate to their directors the power to bind the shareholders by negotiable instruments. There may be companies which do not communicate any such power. If the power is to be given to the directors it must be given by the memorandum and articles of association." Companies for trading purposes would, as an incident, possess the

power to become parties to negotiable instruments, without specially providing for the exercise of that power by the articles of agreement. Other companies, which did not possess that power inherently by their creation, would have to provide for its acquisition specially by their articles of union: see also *Bramah v. Roberts* (3 Bing. N. C. 963.)

In this case it does not seem to be a necessary incident to, or an inherent right in a mining company to draw, accept or endorse bills of exchange for the purposes of their business, and it must therefore appear that this authority has been conferred upon the corporation or the managing body representing it, either in express terms or by reasonable implication.

In the case last referred to, the Lord Chancellor was of opinion the railway company there mentioned had such a power from the very general language, that "to the attainment of the main object of the company they may do, either in the United Kingdom, or Peru, or elsewhere, whatsoever they from time to time think incidental or conducive thereto."

The articles of association were not put in at the trial, and although they have since been produced there is nothing in them which authorizes bills to be drawn or accepted by them as a convenient or essential part of their business. The "selling or otherwise disposing of such ores as the company may see fit" does not, in our opinion, confer this power by implication.

As to the direction of the bills being to Glass, the secretary of the company, the question is, whether it warranted the acceptance of them by him in the name of the company.

In *Murray v. The East India Company* (5 B. & Al. 204) the bill was directed to the directors of the company, and it was accepted by the secretary by order of the court.

In *Neale v. Turton* (4 Bing. 149) the bill was drawn on the directors of the company, and accepted for the directors by the secretary.

In both cases it was considered that bills drawn on the directors are in effect drawn on the company.



So in *Penrose v. Martyr* (1 E. B. & E. 499) a draft directed to the company, and accepted by their officer as secretary to the company, is saying that he signed it on their behalf.

The cases of *Nicholls v. Diamond* (9 Ex. 154) and *Mare v. Charles* (5 E. & B. 978) are not opposed to these decisions.

We are of opinion, then, that these bills directed to Glass as secretary of the company authorized him to accept them as he did on behalf of the company, if he had the authority from the company so to act for them.

If the trustees had authority to accept the bills, as before stated, there is evidence that Glass as secretary acted with their full knowledge and by their authority in all he did to bind the company through them ; but on perusal of the articles it appears there was no power in the trustees to accept the bills.

It was not necessary to put the seal of the company to acceptances, if they had the power to accept bills of exchange at all : *Church v. The Imperial Gas Light Co.* (6 A. & E. 846) ; *Murray v. East India Co.* (5 B. & Al. 204) ; *Broughton v. Manchester Waterworks Co.* (3 B. & Al. 1) ; *Slark v. Highgate Archway Co.* (5 Taunt. 792) ; *Aggs v. Nicholson* (1 H. & N. 165).

Whether Glass had authority to accept for the company ; and whether the company could accept the bills, or could formally do so without seal, are all in issue under the plea traversing the acceptance in manner and form as alleged.

The only remaining question is, whether these defendants are personally liable, and that depends upon the positive provision of the statute, that the trustees shall be personally liable when the name, style and amount of the capital stock have not been written or printed in letters at least as large and distinct as any others used in these bills of exchange, at the head thereof. There is not a word of the amount of the capital stock in the bills of exchange, or in the acceptances thereof. The trustees would therefore have been personally liable if they could have accepted

bills at all for the company. But as they had no such power, and as they do not contract individually, they are not liable in their own right.

The rule will therefore be absolute, leaving the verdict for the defendants to stand, or that a nonsuit be entered, if the plaintiff prefer it (*a*).

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### HART V. PACAUD.

*Replevin—Practice—Appearance—Service out of the jurisdiction.*

The proceedings in replevin as regards appearance are regulated by the Replevin Act, C. S. U. C. ch. 29, not by the C. L. P. A.; and an interlocutory judgment signed as for want of a plea, without any appearance by or for defendant, is therefore a nullity.

The plaintiff having served a writ of replevin on defendant, at his residence in the United States, and replevied the goods here, obtained a judge's order to proceed as if the case were within the general provisions of the C. L. P. A.; and having served the declaration, &c. in accordance with such order, signed interlocutory judgment as for want of a plea, without any appearance, and assessed damages at the assizes. *Held*, that the order was unauthorized; and all the proceedings were set aside.

REPLEVIN for several casks of wine, brandy, &c., which the plaintiff alleged the defendant took and detained from him, &c., and he claimed a return, and \$600 damages for the detention.

No appearance being entered by the defendant, the plaintiff, on filing the usual affidavit of service, &c., on the 11th October, 1867, obtained from Morrison, J., an order to proceed (the defendant living out of the Province) as if the action came within the general provisions of the C. L. P. Act. No plea being filed, the plaintiff signed interlocutory judgment on the 23rd January, 1868, and damages were assessed at the Spring Assizes, at Sandwich, at \$44 for the detention, and the expenses of the replevin bond.

During last Easter term *C. Robinson*, Q. C., obtained a rule calling on the plaintiff to shew cause why the service

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(*a*). The plaintiff desired a nonsuit to be entered, and the rule was therefore made absolute accordingly.

of the writ of replevin and subsequent proceedings, including the assessment of damages, should not be set aside, for irregularity, with costs, on the grounds that neither the said writ of replevin, nor any proceeding or papers in the cause subsequent thereto, were duly served on the defendant, and the said defendant had no notice or knowledge of any proceedings in this cause after the service of the writ of replevin upon him, out of the jurisdiction of this honorable court; or why the assessment of damages and the interlocutory judgment should not be set aside, upon payment of costs, on the merits; or why the assessment of damages should not be set aside, on the ground that \$44 had been improperly allowed as damages.

From the affidavits filed it appeared that the defendant resided at Iona, in the State of Michigan, U. S., and that a copy of the writ of replevin was served on him there, on the 19th September, 1867. The defendant swore no other papers or proceedings had been served on him, and that he had no knowledge or notice whatever of any other proceedings, until he was informed at the time of his making the affidavit (20th May, 1868) of the assessment of damages; and he also swore that he had a good defence to the action on the merits. It also appeared that the writ of replevin issued on the 3rd September, 1867, addressed to the Sheriff of Essex: that he returned it executed by delivery of the goods and serving a copy of the writ on the Freight Agent of the Great Western Railway Company at Windsor.

It was admitted that no appearance had been entered by or for the defendant. Affidavits were filed to shew that the service of the declaration, &c., as provided by the judge's order to proceed, was made. Interlocutory judgment was signed for want of a plea, and the damages assessed, as already stated.

The case was argued in Easter Term, and re-argued during this term, owing to the changes on the Bench.

*Blevins* shewed cause, contending that by the Common Law Procedure Act, sec. 54, an appearance by plaintiff

for defendant was dispensed with in all actions, including replevin, notwithstanding the provisions of the Replevin Act, Consol. Stat. U. C. ch. 29; and that at all events the want of such appearance was an irregularity only, not a nullity, and waived by the delay, the writ having been served in September and this application not made until May: *Ch. Arch. Prac.*, 11th ed., 216, 1077; *Har. C. L. P. A.* 122.

*Robinson*, Q. C., supported the rule. He argued that the want of an appearance, if necessary, clearly made the interlocutory judgment a nullity, which could not be waived by delay: *Roberts v. Spurr*, 3 Dowl. 551; *Lane v. McDonnell*, R. & H. Dig. 28; *Nichol v. McKelvey*, R. & H. Dig. 29; *Herr v. Douglass*, 4 P. R. 102; *Ch. Arch. Prac.*, 12th ed., 1471, 1474; and that such appearance was requisite here, the proceedings in Replevin in that respect being specially provided for by the Replevin Act, and not within the Common Law Procedure Act.

The sections of the statutes cited in the argument are referred to in the judgment.

MORRISON, J., delivered the judgment of the court.

The Common Law Procedure Act, Consol. Stat. U. C. ch. 22, sec. 2, enacts that all personal actions shall be commenced by a writ of summons according to an appended form; and by the fourth section all writs of summons and all *writs of replevin* shall issue from the office in Toronto; and by the 43rd section, in an action against a defendant being a British subject residing out of Upper Canada, the writ of summons shall be according to a certain form, and the time for appearance thereto shall be regulated by the distance from Upper Canada of the place where the defendant resides. The 53rd section provides the mode and form of appearance by the defendant *to a writ of summons* issued under the authority of the act, and the following section enacts that in no case shall it be necessary for the plaintiff to enter an appearance for the defendant; and sec. 55 provides for the case of non-appearance by the defen-



dant where the writ of summons is endorsed specially, and the 56th section when not so endorsed; and by the 73rd section it is enacted that causes of whatever kind may be joined in the same suit, but that the provision shall not extend to *replevin* or ejectionment.

The statute recognizes a distinction between writs of summons and writs of *replevin*, and only provides for appearances in cases of action commenced by the former; and in express terms prevents *replevin* being joined with any other cause of action, that is, commenced by a writ of summons, the statute first enacting that all personal actions shall be commenced by writ of summons. And the reason is quite obvious, as the Legislature, by Consol. Stat. U. C. ch. 29, passed at the same session, provides for the commencement of the action of *replevin* and all subsequent proceedings therein. It provides for the form of the writ of *replevin*, which is addressed to the sheriff, and returnable on the eighth day after service, and that it shall be tested in the same manner as a writ of summons under the Common Law Procedure Act; and by the 12th section it is enacted that if the defendant be duly served with a copy of the writ, and does not appear at the return, the plaintiff may, on filing an affidavit of service, enter a common appearance for the defendant and proceed therein as if he had appeared. And by the 14th section, that upon an appearance being duly entered by *or for* the defendant, the plaintiff shall declare and proceed to judgment according to the practice in *replevin* in England, &c.

It was contended for the plaintiff that the proceedings in *replevin* as to appearance were regulated by the 54th section of the Common Law Procedure Act, and that if a defendant failed to enter appearance, the plaintiff could proceed without entering one for him. We think not. The 54th section, although in wide terms, was evidently meant to be read in connection with the preceding section, and as only referable to actions commenced by writ of summons; and it also appears to us very clearly that it was intended that the proceedings in *replevin* should be carried on as

pointed out in the Replevin Act, and that it was contemplated by the Legislature that the defendant in replevin should be in court before the plaintiff was authorized to proceed in his action, in the same manner as the practice stood before the Common Law Procedure Act, under the provisions of the 4 Wm. IV., ch. 7, and the 14 & 15 Vic. ch. 64. Such being the case, my order of the 11th of October, 1867, authorizing the plaintiff to proceed in the action, was improperly made; and as it is admitted that no appearance has been entered for or by the defendant; in other words, that the defendant is not in court, the signing of the interlocutory judgment was a nullity, and it and the subsequent proceedings must be set aside: See *Roberts v. Spurr* (3 Dowl. 551); *Watson v. Dow* (5 Dowl. 584); *Lane v. McDonnell* (H. T. 7 Wm. IV.) noted in *Cameron's Digest*, 64.

It becomes unnecessary to consider the other objections taken in the rule. The rule must be absolute setting aside the interlocutory judgment and all subsequent proceedings, with costs, upon the defendant entering an appearance.

*Rule absolute (a).*

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### O'BRIEN V. WELSH, ET AL.

*County Court—Jurisdiction—Title to land—Certiorari.*

In replevin the defendants avowed under a distress for rent, to which the plaintiff pleaded that he did not hold the land as tenant, &c., as in the avowry alleged. *Held*, that the title upon this plea did not necessarily come in question, and that the record therefore did not shew a cause of action beyond the jurisdiction of the County Court.

Where an action has been brought in the County Court beyond its jurisdiction, or when being rightly brought there the jurisdiction has been determined by matter of pleading or evidence, the whole proceedings are *coram non judice* and void, and they cannot be removed by *certiorari* into the Superior Court.

In Michaelmas Term last, *Spencer* obtained a rule, on behalf of O'Brien, calling on Welsh and the others to shew

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(a) See *Great Western R. W. Co. v. McEwan*, Post.

cause why a writ of *certiorari* should not issue, to remove a certain action of replevin now pending in the County Court of the County of Peterborough, and all things touching the same, into this court, in which said action Dennis O'Brien is plaintiff, and Margaret Welsh, Thomas Kirkpatrick, and Alexander S. Kirkpatrick, are defendants—upon reading the affidavits and papers filed in Chambers on the application herein, and by leave of the court re-filed in this court on this application.

The declaration was filed in the County Court on the 24th of September, 1866. It set forth that the defendants, at the township of Douro, took one red and white cow, one calf, one plough, and five sheep, the goods of the plaintiff, and detained them against sureties and pledges; and the plaintiff claimed a return thereof.

The defendant Margaret Welsh pleaded on the 11th of October, 1866, by way of avowry, that Dennis O'Brien, during all the time, held the west half of lot No. 2, in the 5th concession of Douro, as tenant thereof to James Welsh, an infant within the age of twenty-one years, under a demise thereof at the yearly rent of \$80, payable on the 1st of January in each year; and because \$160 of the said rent at the time when, &c., was due and in arrear from Dennis O'Brien to James Welsh, the defendant Margaret, as guardian to James Welsh, well acknowledges the taking of the same goods, and justly, &c., as a distress for the rent so due and in arrear, which still remains due and unpaid.

The defendants Thomas Kirkpatrick and Alexander S. Kirkpatrick pleaded they did not take the goods, and a cognizance similar to the avowry of Margaret Welsh, alleging that they acted as her attorneys in the distress.

The plaintiff pleaded to the avowry and cognizance of defendants: 1. That he did not hold the land as tenant thereof to James Welsh, as in such avowry and cognizance mentioned. 2. That no rent was in arrear as alleged. 3. That Margaret Welsh was not the guardian of James Welsh, as alleged. And as to the plea of Thomas Kirkpatrick and Alexander S. Kirkpatrick, the plaintiff joined issue thereon.

The defendants joined issue on the plaintiff's pleas.

The cause was tried at the sittings of the County Court, held in December, 1866, when a verdict was rendered for the defendants, subject to certain legal objections, upon which leave was reserved to the plaintiff to move in term thereafter for a nonsuit or verdict for the plaintiff.

In the term thereafter, in January, 1867, the plaintiff obtained a rule calling on the defendants to shew cause why a nonsuit or verdict for the plaintiff should not be entered. The defendants, on the argument of the rule, objected to the learned judge proceeding further in the action, because the title to land had come in question on the evidence; and the learned judge thereupon "refused to give judgment, on the ground that the title to lands coming in question, the case was out of his jurisdiction, and having so decided, no right or power remained with him to adjudicate upon the points raised by the rule."

An application was then made to a Judge in Chambers at Toronto for a writ of *certiorari*, which was refused, as it was considered that the plaintiff could not remove his own cause.

It was then believed the defendants would not proceed on the replevin bond, if the case remained as it was, but the defendants, on the 17th of April, 1868, commenced an action on the bond, in the County Court of the County of Frontenac, against the plaintiff and his sureties.

In this last suit, the proceedings were removed in June, 1868, by *certiorari* into this court.

The plaintiff was desirous of having the present cause tried, or of having it placed in such a position by its removal into this court that he could apply for such relief as he might be entitled to. The value of the goods taken was \$45.

*Kirkpatrick* shewed cause. The 23 Vic. ch. 44, declares that no cause shall be removed unless the debt or damages amount to \$100. The damages here are far below that sum. Title to land plainly is in question on these



pleadings : *Dennison v. Knox*, 9 U. C. L. J. 241 ; *Prudhomme v. Lazure*, 3 Prac. Rep. 355 ; *Meyers v. Baker*, 26 U. C. R. 16 ; *Powley v. Whitehead*, 16 U. C. R. 589.

*Spencer* supported the rule. The 23 Vic. does not apply to replevin, for debt or damages are not properly in issue or recoverable. The sum recovered is nominal only, the real recovery is had in ulterior proceedings. *Certiorari* does lie, though the County Court has lost its jurisdiction by the pleadings : *Tidd's Pr.*, 8th ed., 399 ; *The King v. Justices of Somersetshire*, 5 B. & C. 816 ; *Heaton v. Cornwall*, 4 P. R. 148 ; *Landens v. Sheil*, 3 Dowl. 90 ; *Keeling v. Elliott*, Barnes, 399 ; *Taylor v. Shapland*, 3 M. & S. 328 ; *Jones v. Davies*, 1 B. & C. 143 ; *Doe Sadler v. Dring*, 1 B. & C. 253.

ADAM WILSON, J., delivered the judgment of the court.

The first question is, does the title to land come in controversy on the pleadings. If it do not, this application will be refused. If it do, the second question is, whether a *certiorari* can be issued for the purpose of enabling the plaintiff to proceed with his replevin suit in this court.

The first question arises on the plea that the plaintiff did not hold the land as tenant thereof to James Walsh, as in the avowry and cognizance mentioned, pleaded to the said avowry and cognizance, which sets up the right to distrain on the plaintiff for rent in arrear.

The words of the statute are that County Courts shall not have cognizance of any action "where the title to land is brought in question." Consol. Stat. U. C. ch. 15, sec. 16.

The 20th section of the same act provides, that, "No plea, replication, or other pleading whereby the title to any land, or to any annual or other rent, duty, or other custom or thing relating to or issuing out of lands or tenements, is brought in question, shall be received by any County Court without an affidavit thereto annexed that the same is not pleaded vexatiously, nor for the mere purpose of excluding the court from jurisdiction, but that the same does contain matter which the deponent believes to be

necessary for the party pleading to enable him to go into the merits of his case."

The Replevin Act provides—section 3—"In case the value of the goods," &c., "distrained, taken or detained, does not exceed the sum of \$200, and in case the title to land *be not brought in question*, the writ may issue from the County Court," &c. Consol. Stat. U. C., ch. 29.

Every provision of these statutes is careful to exclude the County Courts from entertaining causes in which the title to land *is brought in question*.

In *Stewart v. Jarvis* (2 U. C. L. J., N. S., 330), in Chambers, (affirmed in 27 U. C. R. 467), I had occasion to examine the question as to what pleas do necessarily raise the question of title, and it appeared to me that the plea of not possessed to an action of trespass to realty, though it might at the trial raise the question of title, did not necessarily do so, for the *title* might not be questioned, but the mere fact of possession might be the whole controversy; and the authorities—*Latham v. Spedding* (17 Q. B. 440)—justified this opinion.

If the plea had been, instead of *not possessed*, that "the land was not the plaintiff's," the title would have been in issue: *Humberstone v. Henderson*, (3 P. R. 40), citing *Powley v. Whitehead* (16 U. C. R. 589); *Campbell v. Davidson* (19 U. C. R. 222); see also *Portman v. Patterson* (21 U. C. R. 237).

Under this plea the defendants were bound to prove that the plaintiff held the land as tenant to James Walsh, under a demise, at the yearly rent of \$80, payable on the 1st of January in each year. On proving all these points, which might have been done by production of the lease, if there were one by deed or in writing, or by plain proof of a parol tenancy on these terms, no question of title need necessarily have arisen. If the defendants failed to prove that the plaintiff was a tenant, or a tenant to James Welsh, or that he held at the rent of \$80, or that it was payable yearly, or payable on the 1st of January in each year, they must have failed to establish the issue, and no question of

title might have arisen. The whole statement of the avowry might have been untrue, or it might have failed because of variance, and unless an amendment had been allowed the plaintiff would have succeeded, for no title would have been the subject of enquiry at all.

Under this plea the authorities are too plain to make it necessary to cite them for the purpose of shewing that the defendants must prove the particulars of their demise as they have alleged it; and it is obvious that all this may be done without litigating, or starting, or meaning to litigate or start the question of title to the land or to the rent at all.

But the title may come in question under this plea: *Hall v. Butler* (10 A. & E. 204); *Rogers v. Pitcher* (6 Taunt. 202); *Claridge v. Mackenzie* (4 M. & G. 143); *Owen v. DeBeauvoir* (16 M. & W. 547, 5 Ex. 166); *Downs v. Cooper* (2 Q. B. 256). And under it, according to some of these cases, it may be shewn that since the demise the landlord's title has terminated.

We have already said that under the plea of not possessed to an action of trespass to realty, it appears the title does not as of course come in issue; it may or it may not, according to the evidence. If it do come in issue by the evidence at the trial, the Judge of the County Court must stop the cause there, and then he can proceed no further because the title is brought in question: *Powley v. Whitehead* (16 U. C. R. 589); *Campbell v. Davidson* (19 U. C. R. 222); *Portman v. Patterson* (21 U. C. R. 237).

In *Powley v. Whitehead* the Chief Justice points out the distinction between pleas which do directly bring the title in question, as in that case the plea of *liberum tenementum*, and those which may bring it in question.

So, in *Portman v. Patterson*, the Chief Justice again said: "In this case the title to land was not, for all that appears on the record, brought in question by the pleadings. Then was it by the evidence upon the trial?" The action was not on the record for matters relating to the realty, but the proof brought the title into litigation.

Upon this plea of *non tenuit*, while all that may be in

controversy under it may be merely the terms of the demise as alleged in manner and form, and may all be depending upon a question of variance, we are of opinion the title does not necessarily come in question, and that the record does not shew a cause of action beyond or out of the jurisdiction of the County Court.

Our statutes refer to such pleadings which directly and manifestly deny or set up title to the realty, such as *liberum tenementum*, or, it may be, a plea denying the land to be the plaintiff's. In such cases the jurisdiction is ousted at once by virtue and operation of the pleadings : *Darby v. Cosens* (1 T. R. 552).

And our statutes apply also to those pleas of not possessed, *non tenuit*, and such like, not by the mere effect of their being pleaded, as in the other class of cases, but by its appearing under them at the trial, by evidence, that the title is brought into question, and is advanced as the subject for adjudication, in which case the jurisdiction of the County Court is ousted on the evidence and precord together.

A plea, then, which *may* raise title, does not affect of itself the jurisdiction. So a plea of title cannot, after it has been pleaded, confer or retain the jurisdiction, though the issue on it has gone off on a collateral point quite beside the question of title : *Cannon v. Smalwood* (3 Lev. 203); *Tinniswood v. Pattison* (3 C. B. 243).

In our opinion the cause, judging of it from the record, was and is one competent for the County Court to try, and it is still pending there.

But how does it stand upon the evidence? We have not the evidence before us to judge of it.

There is a copy of the judgment of the late judge of the County Court, in which there are a few statements from which we may gather some slight information as to what the contest really was.

He says in one place :—" It seemed to me that the question of title to land might be considered in issue, but both counsel insisted that it was not necessarily, and possibly as



the case went to the jury it was not." In another place he says : "I confess there is a difficulty about the proper determination of the cause, as it went to the jury. I simply left it to them to say whether or not there was a new lease made by Patrick Welsh under the will. They were told that the effect of accepting a new lease operated as a surrender of the term yet to come of the former lease, and if they answered the question in the affirmative, then to find a verdict for the plaintiff. The jury found there was no acceptance of a new lease, and found for defendants."

So far as I can collect from these statements, the question was this—did plaintiff hold under the lease set out in the avowry, or under the new lease said to have been made by Patrick Welsh? That is, did the plaintiff hold under James Welsh, under whom the defendants justified, or under Patrick Welsh, under whom the plaintiff claimed title?

If this were the question, then the plaintiff was disputing the title set out in the avowry by setting up a counter-title to it, under which he claimed, and the jurisdiction was determined.

If there be any doubt about this, we must be furnished with the evidence, because the question has to be determined now upon what was set up and proved, or attempted to be proved, in good faith at the trial : *Lloyd v. Jones* (6 C. B. 81); *Pearson v. Glazebrook* (L. R. 3 Ex. 27.)

Assuming the effect of the evidence to have been as we have stated, the learned judge in the end rightly decided that his jurisdiction had ended, and that the cause was no longer rightfully before him for adjudication. Against this decision the plaintiff could perhaps have appealed—*Arch. Pr.*, 11th ed., 1725, note (c); *Regina v. Bolton* (1 Q. B. 66)—if he had desired to do so, because the judge's decision was not final. He has therefore lost the benefit of an appeal, of whatever service that might have been to him.

The next question is, can the plaintiff remove the cause from the County Court? The objection to it is, that the court below having no longer jurisdiction of it it cannot be removed; that a proceeding *coram non judice* is the same as if there were no proceedings there in fact.

In *Powley v. Whitehead* (16 U. C. R. 595), where freehold was pleaded in the County Court, Mr. Justice Burns said: "The course which the plaintiff should have pursued was, upon the plea in bar being put in, the trial of which could not take place in the superior" [*Qu. inferior?*] "court, to have removed the cause into the superior court by *certiorari*, and have proceeded with the case there."

In *Meyers v. Baker* (26 U. C. R. 20) the Chief Justice said: "If the County Court has not jurisdiction, then the plaintiff in truth wants a *certiorari*, not because the cause is one which can be *more properly tried* in the superior court, but because he has brought his action in a court where it cannot be tried at all. It appears to us a *certiorari* imports authority in the inferior court to entertain and dispose of the case, but removes it because it is fitter it should be adjudicated upon by the higher tribunal. Now here the plaintiff is evidently apprehensive the judge will decide that he has no jurisdiction; in fact it is represented that he did so decide when he set the verdict aside. It may be conceded it was not very logical to do so on the ground that it had appeared the proceeding was *coram non judice*, but if that be so in fact, there is no cause in the inferior court to remove."

In *Dennison v. Knox* (3 P. R. 150), and *Prudhomme v. Lazure* (3 P. R. 355), it was considered a plaintiff had no right to remove his cause from either the County or Division Court, as he had himself selected his own tribunal.

In *Burns v. Kelly*, not reported, but stated in 4 P. R. 148, to a count for trespass to realty, the defendant pleaded the house was not the property of the plaintiff, and a *certiorari* was granted to remove the cause from the County Court.

In *Heaton v. Cornwall* (4 P. R. 148), I made an order for removal of a replevin suit from the County Court, in which the defendant had pleaded that the staves which were taken off a particular lot of land were his goods, on the ground that the plaintiff feared the title to land would be brought in question.

In that case I followed the course which had been taken in *Burns v. Kelly*, and I said: "I have not satisfied myself as to the jurisdiction which I now exercise, nor have I any settled opinion the other way."

In *Tidd's Pr.*, 9th ed., 399, it is said: "Though the cause cannot be determined in the court above, yet this writ may be granted, if the inferior court have no jurisdiction over it, or do not proceed therein according to the rules of the common law. But if the inferior court have jurisdiction, and the court above have not, a *certiorari* cannot be had."

In *The King v. The Justices of Somersetshire* (5 B. & C. 816), the justices in Petty Sessions had power to revise surveyor's accounts which had first to be laid before a single justice. They assumed to exercise original jurisdiction, without the accounts having ever gone before a single justice. The court granted a *certiorari* to the justices at Petty Sessions to send up their order allowing the accounts, which when done the court quashed the order because it was a proceeding *coram non judice*. *Keeling v. Elliott* (Barnes, 399,) shews that the plaintiff may remove his own cause.

We cannot form any satisfactory opinion upon anything decided in this province, nor can we find any English decision at all bearing directly on the question.

We can find no case which shews that a *certiorari* can issue to remove a cause from an inferior court which was commenced there without jurisdiction, or which has become by reason of the pleadings or evidence a proceeding beyond the further cognizance of the court. The whole matter in either case is then *coram non judice* and void, and we can perceive no distinction between proceedings commenced without jurisdiction and failing afterwards from want of jurisdiction arising.

We do not know how a suit begun without jurisdiction can be removed and continued. It was at the first a void proceeding, and must, it appears to us, remain void. Nothing can give it validity, vigour or effect; and we are of opinion, when the want of authority afterwards arises, it

affects all the antecedent proceedings and vitiates the whole of them.

How then can they be removed for the purpose of being further prosecuted ?

The superior courts may unquestionably remove by *certiorari* all proceedings from inferior courts, even when such courts have exceeded their jurisdiction, or have no jurisdiction over the particular matter. But that is to see if they have exceeded their jurisdiction or are acting beyond it, and to restrain them if they have done so or are doing so: *Rex v. Moreley* (2 Burr. 1042); *The King v. Reeve* (1 W. Bl. 232).

If there be an usurpation appearing they would be restrained; if no usurpation appeared, the writ would be superseded and a *procedendo* awarded.

So a *certiorari* will be granted to aid the inferior court, or to remove an indictment in order to have process of outlawry. But if the defendant afterwards appear, a *procedendo* will be awarded and the record sent to the court below: *The King v. Perry* (5 T. R. 478); or to have judgment issued on a conviction: *Com. Dig.* "Certiorari," A. 1.

We have no doubt that in every case, whether the inferior court has jurisdiction or not, and whether the superior court can proceed in such cases or not, the superior court, for the purpose of exercising its superior power in keeping all inferior jurisdictions within the bounds of their authority, can issue the writ of *certiorari* to be informed of what is being done, and may retain certain cases and carry them on in its own sphere, or may remit them again, or, if it be necessary, may prohibit their further progress below.

But while the rule of law is, that when the court has no jurisdiction of the cause the whole proceeding is *coram non judice*, and all parties are liable who act under it, it appears to us we cannot take up such proceedings and legalize them merely by transferring them to another court which has jurisdiction. The proceedings founded on the void initiation must be as vicious as the process on which they rest.

The absence of all authority that such proceedings can



be removed or ever have been removed by *certiorari* in England is a very strong argument against the legality or the right, and one would think that if such a practice could have been adopted, it would always have been taken when a prohibition was moved for to counteract its prejudicial operation. But in every case in which the prohibition has gone, it has gone absolutely, without any mention being made of the party's right or power to maintain his proceedings by the summary process of a *certiorari*.

We come, therefore, to the conclusion that when an action has been begun in a County Court which had not jurisdiction to entertain it, as well as when the action has been rightly begun there, but the jurisdiction has been lost by matter of pleading or of evidence upon the pleadings in the cause, that the whole proceedings are *coram non judice* and void, and that they cannot be removed for the purpose of prosecuting the suit in the superior court which has jurisdiction in such an action.

In our opinion the rule should be discharged, but not with costs.

*Rule discharged (a).*

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WELSH ET AL. V. O'BRIEN, ET AL.

*Action on replevin bond—Neglecting to prosecute with effect.*

To a breach of a replevin bond in not prosecuting the suit, which was in a county court, with effect, defendants pleaded that the suit was brought to trial without delay, and a verdict given for defendants, with leave reserved to move for a non-suit or verdict for plaintiff: that in the next term a rule *nisi* was obtained accordingly, on the argument of which defendants therein objected to the judge proceeding further, because title to land had come in question, whereupon the judge determined that the jurisdiction of his court was ousted, and he declined giving judgment, and none had ever been given; and that the plaintiff in the cause then applied in chambers at Toronto for a *certiorari*, which was refused.

*Held*, that the plea shewed no defence; for that the suit had been brought to an unsuccessful termination, and the fact of the defendants in it having caused such result by objecting to the jurisdiction could not prevent their recovery on the bond.

DECLARATION on a replevin bond, conditioned that the

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(a) See the next case.

defendant Dennis O'Brien should commence an action against the now plaintiffs in the County Court of the County of Peterborough, for taking and unjustly detaining certain goods, the property of the said Dennis O'Brien in said condition mentioned, and should prosecute such suit with effect and without delay, and should also make return of the said goods, if a return thereof should be adjudged, and should pay such damages as the defendant did sustain by the issuing of the writ of replevin, if the plaintiff failed to recover judgment in the suit, and observe, keep, and perform all rules and orders made by the court. Breach, that although the said O'Brien did commence such action of replevin according to the terms of the said condition, yet he did not prosecute his said suit with effect and without delay, and although the now plaintiffs have sustained damages by the issuing of the writ of replevin, yet he did not pay such damages.

Plea—To so much of the said declaration as alleges, as a breach of the bond, that the said defendant Dennis O'Brien did not prosecute the replevin suit in said declaration mentioned with effect—that the bond was subject to a condition, that if the said Dennis O'Brien should prosecute his suit against the now plaintiffs, Margaret Welsh, Thomas Kirkpatrick, and Alexander Kirkpatrick, in the County Court of the County of Peterborough, holden at Peterborough, for taking and unjustly detaining certain goods, the property of the said Dennis O'Brien in said order mentioned, with effect and without delay, and should also make a return of the said goods, if a return thereof should be adjudged, and should pay such damages as the defendants did sustain by the issue of the writ of replevin, if the plaintiff failed to recover judgment in the suit, and observe, keep and perform all rules and orders made by the court, then the said bond should be void. And the said defendants say that the said Dennis O'Brien did commence an action against the now plaintiffs, Margaret Welsh, Thomas Kirkpatrick, and Alexander S. Kirkpatrick, in the County Court of the County of Peterborough, holden at

Peterborough, for taking and unjustly detaining said goods, which said action was duly and without delay brought down to trial at the sittings of the said County Court held first after the giving of the said bond, and a verdict given for the said defendants therein, subject to certain legal objections urged by the said plaintiff therein at the said trial, on which objections leave was reserved to the said plaintiff therein to move in term for a nonsuit or a verdict for said plaintiff: that during the said term next following the sittings of the said court, the plaintiff in said action caused to be issued out of said court a rule *nisi*, calling upon the defendants therein to shew cause why the said verdict should not be set aside, and a verdict or nonsuit entered for the plaintiff therein; and that upon the argument thereof during the said term, the said defendants therein objected to the learned judge proceeding further in the said action, because the title had come into question on the evidence; and the learned judge thereupon, without giving judgment on said rule, determined that the title to land having come in question the jurisdiction of the said County Court was ousted, and he declined giving judgment therein, and no judgment has in fact yet been delivered by said judge of the County Court in said cause; and thereupon the said plaintiff therein duly made an application, upon affidavits, to the presiding judge in Chambers at Osgoode Hall, Toronto, for an order to remove said cause into Her Majesty's Court of Queen's Bench, which application was by said judge refused, and no writ of *certiorari* to remove said cause has since been granted; and the said defendants further say, that therefore the said defendant Dennis O'Brien has commenced said action in said bond mentioned, and has prosecuted the same with effect—which is the said breach in said declaration mentioned, and by this plea pleaded to.

Demurrer and joinder.

*Kirkpatrick*, for the demurrer.

*Scott*, contra.

The authorities cited are referred to in the judgment.

RICHARDS, C. J., delivered the judgment of the court.

The plea demurred to only applies to that portion of the breach which alleges that O'Brien did not prosecute his suit with effect, the breach in the declaration being that he did not prosecute the suit with effect and without delay. The question is, does the decision of the judge of the County Court refusing to pronounce any judgment on the rule *nisi* referred to in the plea, shew a termination of the replevin suit, or such a decision in the matter as amounts to a termination of the suit.

Many of the authorities on the subject are referred to in *Williams' Saunders*, vol. 1, p. 195, i. k. note *p*. Prosecuting the suit with effect means with success, or rather to a not unsuccessful termination. When the breach assigned is, that the plaintiff in replevin did not prosecute his suit with effect, it is a good plea that he did appear at the next County Court, and there prosecute his suit according to the condition, and which suit is still depending: *Brackenbury v. Pell* (12 East 585). But when the breach assigned is, that the plaintiff in replevin did not prosecute the suit without delay, it is no answer that the suit is still pending.

The case of *Jackson v. Hanson* (8 M. & W. 477) refers to most of the decided cases up to that time, and was very ably argued. In that case Baron Parke declared the true import of the term prosecuting with effect is, that the party is to prosecute his suit to a not unsuccessful termination.

In *Harrison v. Wardle* (5 B. & Ad. 152) Baron, then Mr. Justice, Parke said: "Where the breach assigned is, that the plaintiff in replevin did not prosecute his suit with effect, it is a sufficient answer to shew that that suit is still pending; but it is no answer where the breach also is, as in this case, that he did not prosecute it without delay." In giving judgment in that case, Lord Denman said, in referring to a case in *Carthew* 519, "But in that case the question did not arise upon a breach assigned for not prose-



cuting without delay ; and if any effect is to be given to those words, it seems impossible to say, that if the plaintiff in the suit does not use due diligence in its prosecution, the condition is not broken ; and the opinion of the court in the latter part of the judgment in the case of *Axford v. Perrett* (4 Bing. 586) is to the same effect."

In *Morris v. Matthews* (2 Q. B. 291) the action was on a replevin bond, assigning as a breach that the distrainee did not prosecute his suit with effect (not adding without delay). The allegation in the declaration was, that the distrainee did appear in the County Court, and levied his plaint, which was afterwards, at the instance of the distrainee, removed into the Court of Common Pleas, but the distrainee did not appear in that court, and did not prosecute his suit with effect, though a reasonable time hath elapsed, and that afterwards the distrainee died. The plea was, that after the removal of the suit, and before the *re. fa. lo.* was returnable, the distrainee died. Replication, that whilst the suit was pending in the County Court, the distrainee sued out the *re. fa. lo.*, and thereby delayed the suit, and prevented them from proceeding in the County Court, wherefore the death of the distrainee was no excuse. Lord Denman said "It is, I think, no strain on the meaning of the words, to hold that a party who carries the suit regularly forward in any court, prosecutes with effect. Here, I think, the plaintiff in replevin did prosecute with effect ; for he took the proper steps to try his right, but was interrupted by death ; and the act of God cannot place the sureties in a worse position." Williams, J., said "The complaint is, that the plaintiff in replevin did not prosecute with effect ; the answer is, that he did prosecute with effect till his death."

*Rider v. Edwards* (3 M. & G. 202) seems to lay down a doctrine somewhat different from the decision in *Morris v. Matthews* and *Jackson v. Hanson*. In *Rider v. Edwards* the condition was, that the plaintiff in replevin should appear in the next County Court, and then and there prosecute his suit with effect. The defendant pleaded that the

distrainers entered their appearance at the next County Court, and the suit thenceforth has been and is pending and undetermined. The plea was held bad, as not shewing that the distrainee appeared at the next County Court, or was discharged from appearing. Tindal, C.J., held that the plea should shew the plaintiff in replevin to have appeared in the County Court according to the condition, "or it should have shewn facts which, according to the practice of the County Court, rendered his appearance unnecessary. We are not bound to take notice of the practice of the County Court, and the plea does not disclose it." In the argument in that case Tindal, C. J., said, "That part of the condition which requires the distrainee to prosecute his suit with effect, appears to be broken by not using due diligence in prosecuting his suit, although the suit is still undetermined." *Harrison v. Wardle* (5 B. & Ad. 146) is referred to. I have noted already the effect of the decision of Lord Denman in that case, as I understand it.

In *Tummons v. Ogle* (6 E. & B. 580) Coleridge, J., says prosecuting the suit with effect means succeeding in the suit.

In the *Queen v. Raines, County Court Judge* (1 E. & B. 854) a mandamus was granted to compel the County Court judge to hear a plaint in replevin entered for trial in his court. The judge had declined to try the cause, on the ground that he had no jurisdiction. The rule was obtained on behalf of the plaintiff in the suit. The court held that under 9 & 10 Vic. ch. 95, secs. 119, 120, 121, the County Court had cognizance of an action of replevin, though if either party entered into the recognizance under the 121st section, the plaint might be removed to any court competent to try the same, in such manner as hath been accustomed.

In the matter of the plaint between *Fordham v. Akers* (4 B. & S. 578) the County Court judge held he had no jurisdiction to try the case, as the title to an incorporeal hereditament was in question, and the parties refused to

sign a consent in writing under 19 & 20 Vic. ch. 108, sec. 25, to his having power to decide the claim. The court, under the authority of *Regina v. Raines*, and the statute referred to, and the statute 19 & 20 Vic. ch. 108, secs. 2, 65, 67, 68 and 69, made a rule for a mandamus absolute, directing the judge to hear and determine the plaint or action in replevin.

The only case I have met with closely resembling this is *Tubby v. Stanhope* (5 C. B. 790). The declaration was on a replevin bond in a proceeding in one of the County Courts of Middlesex. The allegation was that H. made his plaint in the said court against the now plaintiff, averring that he did not prosecute his plaint with effect, and that such proceedings were thereupon afterwards had that it was adjudged in and by the said County Court that H. should take nothing by his plaint, but that he and his pledges to prosecute should be in mercy, &c., and that he, the now plaintiff, should go thereof without day, &c., whereby the said bond was forfeited.

The defendants pleaded *nul tiel record*. A transcript of the record in the County Court was produced. The first one referred to minutes of judgments, orders and other proceedings, at the court held on Tuesday 26th October, 1847. Then, under the headings No.—plaintiff—defendant—&c., the following entry was made: No. 7479, *Abraham Hart v. Samuel Tubby*, unlawful detention of goods belonging to plaintiff, amount of claim £6.0s.6d. Then, under the heads, for whom judgment given—amount of judgment—costs—there were blanks. Then, under the head of order, “struck out for want of jurisdiction, and disputed title having been sworn to.”

A similar minute of judgments, &c., for the court held on the 26th November. The entry was of the same number, the same plaintiff and defendant; the particulars of action, replevin for unlawful detention of goods belonging to the plaintiff; amount of claim, £6 0s. 6d.; judgment given for the plaintiff; amount of judgment £4 4s. 6d.; costs, £5 8s. 10d.; order, to be paid on the 3rd day of December next.

For the plaintiff it was contended the first entry shewed a determination of the suit. The second had relation to transactions which took place after the commencement of the action on the bond. Wilde, C. J., said : "Does the first entry amount to a judgment?" It was argued for the plaintiff that the decision then made by the County Judge was tantamount to a nonsuit ; the cause having been disposed of on the 26th October, the jurisdiction of the County Court was at an end, though the judge was probably mistaken in supposing he had no jurisdiction. Wilde, C. J., said "We cannot construe the judge's declining to decide the matter to amount to a judgment. The court proceeded properly afterwards, and decided the causes : and the only judgments returned to us in obedience to the *certiorari*, are those pronounced on the 26th November." There was judgment for defendant on the plea of *nul tiel record*.

We understand the defendants in this case put their defence on the grounds, that the suit in the court below is still pending, and therefore it has not been brought to an unsuccessful termination ; and that the question of title was raised by the now plaintiffs in the court below, and therefore the alleged breach of the bond was occasioned by the act of the plaintiffs themselves, and they cannot recover for that ; and lastly, that the plaintiff in the replevin suit endeavoured to get the case taken up into the superior court, but his application was refused.

As to the second ground, we were referred to the judgment of Wilde, C. J., in *Hayward v. Bennett* (3 C.B. at p. 423), where he says, "If an obligee prevents the performance of the condition of the bond, it is, as against him, equivalent to performance." The argument of the learned counsel is, that the defendants in the replevin suit contended successfully that the judge of the County Court had no jurisdiction ; they therefore prevented the plaintiff there from prosecuting his suit with effect, and therefore as to them the bond ought to be considered performed.

Suppose the defendants had in the court below shewn they were right in making the distress, and had been able to do



this by raising some technical objection, such as excluding the plaintiff from giving evidence of a deed from the defendants themselves to a third party, to whom the plaintiff had attorned before the distress was made; then the defendants would have prevented the plaintiff from prosecuting his suit with effect, but we doubt if that would be any answer in an action on the bond. But if the breach assigned had been that the plaintiff in the court below did not return the goods replevied, and it could be shewn that the now plaintiffs themselves before judgment had by force taken the goods from the plaintiff in the replevin suit, then we have no doubt these defendants might have shewn that as an excuse for not delivering them under the bond. But successfully defending the action on legal grounds can never be an excuse for not performing the condition of the bond.

We do not see how an application to a judge in Chambers at Toronto to remove the case into the superior court can make any difference.

Does the matter set up by the plea shew that the suit is still pending? If the decision of the learned judge of the County Court was wrong, it might be corrected in two ways. If the decision made by him is in the light of a judgment, it might be appealed from. If it is considered as a mere refusal on his part to proceed in an action properly before him, then the cases referred to shew that a mandamus would be granted by a superior court to compel him to go on with the case. Neither of these courses has been taken by the plaintiff in the replevin suit. But an application was made to remove the case into the superior court, which application the judge in Chambers refused to grant.

The proceedings in the replevin suit, from the date of the bond, appear to have been instituted on the 13th August, 1866. There are not any dates mentioned as to the subsequent proceedings, so that it does not appear when the decision in the County Court was made. This action was commenced in May, 1868, and as far as we are advised the

matters have been allowed to rest in the County Court ever since. If we assume the defendants' proposition in argument to be on the proper basis, there can be little doubt that the facts shew that the plaintiffs are entitled to succeed on that portion of the breach assigned, that the plaintiff in replevin did not prosecute his suit without delay.

No objection was taken to the form of the plea, nor is it contended that it is a mere denial of the allegation in the pleading that the plaintiff in replevin did not prosecute his suit with effect. But, as we understand it, the defendants set up matter either in excuse, such as that the conduct of these plaintiffs has prevented the plaintiff in the replevin suit from prosecuting that suit with effect, or as shewing that the replevin suit is still pending. As to the matter of excuse, we have already expressed our opinion. As to the other point, we are of opinion we ought to decide against the defendants.

Suppose it admitted beyond doubt, as we take it we must assume it to be for the purposes of this suit, that owing to the peculiar circumstances of the case the County Court had not jurisdiction, the plaintiff in replevin nevertheless chooses to institute proceedings in that court, gives a bond that he will prosecute the action there with effect and without delay, and then takes property out of the hands of the defendants in that suit. In the progress of the suit he is met with the difficulty that the court has not jurisdiction. The court so decides. Is that not an unsuccessful termination of the suit? We think it is. We see no reason why these facts may not be shewn as constituting such a termination, or else a formal judgment reciting the whole proceedings and the decision of the judge, and the conclusion, as one of law, that the plaintiff should or could not further proceed in the said suit in that court. If an issue is raised as to the fact that the suit was not prosecuted with effect, and that by the judgment of the court it was held that the plaintiff in replevin could not prosecute his suit in that court, and it was necessary to shew that by matter of record, the record itself might be drawn up at any time

before the trial, if such a record could properly be made out on such a decision. We take it for granted that the judgment of the court might be drawn up in accordance with the decision of the judge. The fact of the judge deciding that he had no jurisdiction is averred in the plea, and that in reality disposes of the case. There is the further allegation that the judge declined to give judgment thereon : that is, as we understand the plea, on the question stated in the rule, as to whether there should be a nonsuit or a new trial. Then follow the words, "and no judgment has as yet been given by the judge of the said County Court in the said cause." That, we take it, means no other judgment.

We think the facts set forth in the plea fail to shew that the plaintiff in the replevin suit did prosecute his suit to a not unsuccessful termination, but, on the contrary, it seems to us that they shew that that suit has been brought to a termination unfavorable to him.

*Judgment for plaintiffs (a).*

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(a) See the last case.

REGINA V. JONES (*a*).*Murder—Evidence—Credibility of witnesses, &c.*

On a trial for murder, the Crown having made out a *prima facie* case by circumstantial evidence, the prisoner's daughter, a girl of 14, was called on his behalf, and swore that she herself killed the deceased without the prisoner's knowledge, and under circumstances detailed, which would probably reduce her guilt to manslaughter.

*Held*, that the learned judge was not bound to tell the jury that they must believe this witness in the absence of testimony to shew her unworthy of credit, but that he was right in leaving the credibility of her story to them; and if from her manner he derived the impression that she was under some undue influence, it was not improper to call their attention to it in his charge.

As to certain threats alleged to have been uttered by the prisoner—*Held*, that they were clearly admissible, and if undue prominence was given to them in the charge, the attention of the learned judge should have been called to it by the prisoner's counsel.

Remarks as to alleged misdirection, in not directing that the jury must be satisfied not only that the circumstances were consistent with the prisoner's guilt, but that some one circumstance was inconsistent with his innocence,

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions—*Held*, that a medical witness previously examined for the Crown was properly allowed to be recalled to state that, in his opinion, the injuries found on the body could not have been so occasioned.

Remarks as to evidence of confessions, and an objection that the whole statement was not given.

And as to the effect in criminal cases of a belief by the jury that false evidence has been fabricated for the prisoner, or false answers to questions.

THE prisoner, at the Autumn Assizes for 1868, before Adam Wilson, J., was convicted of the murder of one Mary Jones.

The body of deceased had been found in a field belonging to the prisoner, about half a mile from his house, her death having been caused apparently by several blows, inflicted by a blunt heavy instrument, fracturing the skull, &c.

The case on the part of the Crown consisted of circumstantial evidence, which could not be withdrawn, and which the learned judge was not asked to withdraw, from the jury.

On behalf of the prisoner, his daughter Elizabeth was called, a girl of fourteen, who testified that she herself had killed the deceased, describing the circumstances, and

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(*a*) This case was decided in Michaelmas Term last.



stating that while she was walking home with deceased from prisoner's house a quarrel arose between them, in the course of which, being first struck by deceased, she returned the blow twice with a stick about two feet long and one and a half inches thick, causing her death.

In answer, a medical man previously examined on the part of the Crown was recalled, to prove that the marks of violence found upon the body could not have been caused as described by the last witness.

The learned judge left the whole case to the jury on the evidence. The prisoner's counsel objected to some of the observations in the course of the charge, which were so explained before the jury retired that no further objections were made, and the prisoner was found guilty.

In Michaelmas Term *McMichael* and *Glass* moved for a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection and reception of improper evidence.

The misdirection complained of was in telling the jury they were not bound to believe the witness for the defence, Elizabeth Jones, who declared that she, and she alone, killed the deceased, Mary Jones; that they might consider whether she was then under the influence of any one in court, (there being no reason whatever for suggesting such influence existed), instead of telling the jury that they were bound to believe the testimony of the said Elizabeth Jones in the absence of testimony to shew her to be unworthy of credit; and in telling the jury that the alleged threat made to one James Jones, that he would take the law into his own hands, should be considered by them, and asking them the question, did he (the defendant) take the law into his own hands, instead of cautioning them against giving weight to threats made under the circumstances, at a time more than six months before the alleged murder, with friendly relations between the parties afterwards; and in not directing the jury that they must be satisfied the circumstances were not only consistent with the guilt,

but that there was some one circumstance inconsistent with the innocence of the prisoner.

The improper reception of evidence was in allowing Doctor Billington to be re-called to prove, in opposition to the declaration of Elizabeth Jones that she killed the deceased, that, in his opinion, the said Elizabeth Jones could not have killed the deceased with a stick the size she said she used—as this was skilled evidence and matter of opinion, when skilled evidence and opinion were not admissible, and was an informal and illegal way of impeaching the veracity of the said Elizabeth Jones, and it was collateral to the fact of killing, which was the direct question in issue, and it was unimportant whether the stick with which the blow was struck was an inch and a half or three inches thick, and said evidence was, if admissible, evidence in chief and not in reply, and the said Billington had already given his opinion as to the capability of the said Elizabeth Jones to cause the death of the deceased by the blow of a stick ; also in admitting statements made by Agnes Jones in the absence of the husband, or without its being shewn particularly and affirmatively that he was present and could hear ; and in admitting, contrary to law, the alleged confessions of the prisoner to the witnesses Ladd, Stewart, and Lyons, without giving the whole statements ; and on affidavits.

*Starkie* on Ev., 4th ed. 818, 820, 821 ; *Tay. Ev.*, 5th ed., 1231, were referred to in support of the rule.

RICHARDS, C. J., delivered the judgment of the court.

The first question I shall consider is, whether there was any misdirection in telling the jury they were not bound to believe the witness Elizabeth Jones, who declared that she, and she alone, killed the deceased Mary Jones, and in saying that they might consider whether she was then under the influence of any one in court, (when there was no reason for suggesting such influence existed), instead of telling the jury that they were bound to believe the testimony of the said Elizabeth Jones in the absence of testi-

mony to shew her to be unworthy of credit. We were referred to *Starkie* on Evidence, 4th ed., 820, 821, on this point, where it is laid down that "the law presumes that a disinterested witness, who delivers his testimony under the sanction of an oath and under the peril of the temporal inflictions due to perjury, will speak the truth."

On the same page it is laid down: "It frequently happens that a witness labours under some influence arising from natural affection, near connection, or mere expectation of *contingent benefit or evil*, which may afford a strong temptation to perjury. In these, as in so many other cases, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, under the circumstances, he be the witness of truth."

There can be no clearer or better established rule than that the jury must judge of the credibility of the witness. The nature of the story he tells, the manner of telling it, the probability of its being true, his demeanor, his readiness to answer some questions, his unwillingness to answer others, and his whole conduct indicating favor to one side or the other, must and ought to raise doubts as to his telling the truth. On the other hand, a frank, straightforward manner of answering questions without regard to consequences to either party, a desire to state all the facts, no unwillingness or hesitation to answer,—these are calculated to impress jurors favorably; and in fact the superiority of oral over written examinations of witnesses in extracting the truth, is the opportunity it affords of judging how far you may rely on the mere statements of a witness, when unaccompanied by such other concurrent circumstances as give weight to such statements as facts.

As to asking the jury if the witness was under the influence of any one in court. It appears from the notes of the evidence that at times she hesitated about and delayed answering. Her manner may have indicated that she was under some restraint. She was a young girl—not fourteen years old. Her father, the prisoner, would probably have

considerable influence over her, the more so as it appears from the evidence that he was in the habit of using rather violent language, and it is stated in the affidavits filed on his behalf, by way of excusing or explaining some of the things done by him, that he got very angry at what was done.

It will not be assuming too much against the prisoner to say that, on the whole, there was enough appeared at the trial to shew he was a man of a violent temper and rather excitable. If the learned judge, from the manner of the witness and what occurred at the trial, had the impression that she was laboring under some undue influence, I can see no impropriety in his calling the attention of the jury to the circumstance, and letting them form their own judgment on it. At all events we do not think he ought to have told the jury they were bound to believe the testimony of Elizabeth Jones in the absence of testimony to shew her unworthy of belief.

The next ground of misdirection was in telling the jury that the alleged threat made to James Jones—that he would take the law into his own hands—should be considered by them, and asking the question, did he (the defendant) take the law into his own hands, instead of cautioning them against giving weight to threats made under the circumstances, made more than six months before the alleged murder, with friendly relations between the parties afterwards.

The evidence of threats was undoubtedly admissible; and if the learned judge in commenting on the evidence gave greater prominence to the threats than the prisoner's counsel thought he ought to have done, he should have called the attention of the court to it, and requested that the jury should be told that, if there were subsequent acts of kindness and expressions of friendliness, they would raise a presumption of kindliness to rebut that of malice. If the prisoner's counsel felt at the trial that this matter was not placed before the jury properly, I have no doubt, when he called the attention of the judge to it, it was explained in a satisfactory manner.



The next ground complained of as misdirection was in not directing the jury that they must be satisfied the circumstances were not only consistent with the guilt, but that there was some one circumstance inconsistent with the innocence of the prisoner.

If the learned judge was asked to charge the jury in this way, he probably made such explanations as to their duty as satisfied the prisoner's counsel, and placed the matter properly before the jury. In *Best on Evidence*, 4th ed., sec. 95, it is laid down: "There is a strong and marked difference in the *effect* of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. \* \* \*

And the laws of every wise and civilized nation lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or as an eminent (then) living judge expressed it, 'such a *moral* certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.' The expression 'moral certainty' is here used in contradistinction to physical certainty, or certainty properly so called, for the physical possibility of the innocence of any accused person can never be excluded."

As already mentioned, the learned judge states in his notes that the prisoner's counsel took some exception to his charge. As the jury were about to retire, and before they had retired, he gave such explanations and made such observations to the jury that the learned counsel ceased to object, and the case then went to the jury on a charge which, as a whole, was not open to objection. We cannot now, in moving for a new trial, take what may be considered isolated portions of a charge for misdirection when, as a whole, it was not objectionable.

We cannot, we think, grant a rule on the ground of misdirection.

The next ground is the improper reception of evidence, in allowing Doctor Billington to be recalled to prove, in opposition to the declaration of Elizabeth Jones that she killed the deceased, that in his opinion the said Elizabeth Jones could not have killed the deceased with a stick the size she said she had used—that being skilled evidence and matter of opinion, when skilled evidence and matter of opinion were not admissible.

The question put to Dr. Billington and objected to by the prisoner's counsel at the trial, as we understand it, was : " You have heard the evidence of Elizabeth Jones as to blows which she says she gave the deceased ; would blows so inflicted produce the fractures that were found on the head of the deceased ? " This question was allowed, and the answer was : " A stick such as she describes, one inch or an inch and a half in thickness and two feet long, could not, in my opinion, produce such extensive fractures by two blows ; there must have been a greater number of blows to produce such fractures. There were bruises on both arms, head and legs, and two blows could not have done all that. Deceased must have had a succession of blows from a larger instrument than the girl describes. "

The objection seems to be urged on the ground that this is the evidence of a skilled witness, and he could not be asked his opinion as to the effect of certain blows which she described. The rule seems to be, that a skilled witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine ; but he may be asked a hypothetical question, which in effect will determine the same question. But here the witness was not asked respecting the very point which the jury were to determine, namely, whether the prisoner caused the death of the deceased, nor even the question whether, in his opinion, Elizabeth Jones had killed the deceased, but simply whether the blows, as she described them, could produce the fractures, &c., found on the head of the deceased. It seems to me such questions must in their very nature be proper to be asked and answered, or how could a jury

ever possibly ascertain the true mode in which the death was caused.

I think the judge right in overruling this objection.

The further objection taken in the motion is, that it was an informal and illegal way of impeaching the veracity of a witness. The observations already made seem to me to answer this part of the objection. The medical man is supposed to have knowledge of the effect of blows on the skull and the nature of wounds inflicted. A witness states a wound to be inflicted with a certain kind of instrument. Surely, to test that witness's credibility, you may ask a medical man, can a wound of the kind you describe be inflicted by such and such an instrument? Put an extreme case—an extensive fracture of the skull, with a severe contused wound, said to have been caused by a blow from a willow switch not a fourth of an inch in diameter; surely a skilled witness may be asked, could a piece of willow of that size inflict the wound you saw?

And it is further objected it was collateral to the fact of killing, which was the direct question in issue, and it was unimportant whether the stick by which the blow was struck was an inch and a-half or three inches thick. But if the question was whether she killed the person or not, the mode in which she described the killing had to be taken into consideration; and if she described a mode which skilled witnesses declared it was impossible any one could be killed by, surely that matter was not merely of so collateral a nature as not to permit of contradiction.

The further objection was, that the evidence if admissible should have been given in chief, and not in reply, and that Dr. Billington had already in his evidence expressed his opinion as to the capability of Elizabeth Jones to cause the death of the deceased by a blow of a stick. This objection was not taken at the trial, and if it had been, and was strictly applicable, the admission of evidence by the judge in reply which was admissible in another stage of the cause, is no ground we apprehend for a new trial. Its reception, as a general rule, seems to be a matter in the discretion of the

judge, subject to be reviewed by the court. Now here the particular matter of the size of the stick and the number of the blows had not in any way been brought out before the evidence of Elizabeth Jones was given, and therefore the evidence was properly received in reply.

As to admitting the statements of Agnes Jones, in the absence of her husband, as evidence. There was evidence that the prisoner was present when the statements referred to were made, and the statements themselves really amount to very little, and do not appear to have been objected to at the time.

The last objection is in admitting, contrary to law, the alleged confession of the prisoner to the witnesses Ladd, Stewart, and Lyons, without giving the whole statement. I do not clearly understand this objection, unless it be that the learned judge should have told the jury they were bound to believe all the statements made by the prisoner at the time of the alleged confessions, and that portion of it which exculpated as well as that which implicated him.

The rule of evidence on this point seems to me to be well established, that the whole statement goes to the jury, and they exercise their own judgment as to what they believe of it and what they reject. The rule is briefly stated in *Best*, 4th ed., sec. 520 : "With us, while the whole statement must be received, the credit due to each part must be determined by the jury, who may believe the self-serving and disbelieve the self-disserving portion of it, or *vice versa*. Again, a person on his trial may, at least if not defended by counsel, state matters in his defence which are not already in evidence, and which he is not in a condition to prove, and the jury may act on that statement if they deem it worthy of credit."

We think we have gone over all the grounds taken in moving the rule for default of the judge.

We then fall back on the first ground taken in the motion, that the verdict is contrary to law and evidence.

[The learned Chief Justice here stated at length and commented upon the facts of the case, which he said could



certainly not have been withdrawn from the jury, and remarked that if the jury believed the evidence of the girl to have been fabricated, they would probably consider it a powerful circumstance to prove the prisoner's guilt; referring to *Best* on Presumptions, 209. He then proceeded:]

The rule is laid down in *Best*, on Presumptions, sec. 200, p. 267. "The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor. This rule is derived from the maxim of law, that every person must be presumed innocent until proved to be guilty, and is founded on the most obvious principles of justice and policy. It is, however, in general sufficient to prove a *primâ facie* case; for, as has been well remarked, imperfect proofs, from which the accused might clear himself and does not, become perfect. No one, observes Lord Tenterden, 'is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; and in drawing an inference, or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction.'" At p. 319, secs. 242-3, it is laid down "It has been held that no presumption of guilt arises from the silence of a prisoner" (non-responsion) "before a magistrate, when he is charged even by another prisoner with having been joined with him in the commission of an offence."

"We next come to the subject of *false* responsion, a criminative fact infinitely stronger than either of the former" (viz., judicial and extra-judicial non-responsion). "'In justification of simple silence,' observes Mr. Bentham, 'the defence founded on incompetency on the part of the interrogator might be pertinent, and even convincing; to false responsion the application of it could scarce extend. Of the claim the question had to notice, you (that is, the accused) yourself have borne sufficient testimony; so far from grudging the trouble of a true answer, you bestowed upon

it the greater trouble of a lie.' \* \* \* The presumption of guilt derivable from the suppression, eloignement, destruction, or fabrication of *evidence*, has been already considered."

Evasion of justice is also another circumstance affording a presumption of guilt more or less strong according to circumstances; by this is meant doing some act to avoid judicial inquiry into the crime of which he is suspected.

If the jury really believed that the prisoner's daughter did not kill her cousin, and that the prisoner must have known it, and induced her to state she did kill her, for the purpose of shielding and protecting himself, then no doubt it is in every possible view of the case most damaging to the prisoner, and in connection with the other well established facts shewn by the evidence, no doubt led the jury to view the case unfavourably to him.

We cannot say in this they have done wrong. If the learned judge who tried the cause really felt dissatisfied with the verdict, he having the opportunity of hearing the witnesses and forming an opinion as to their credibility, I might possibly concur in a new trial, but in the absence of any such dissatisfaction, I am not prepared even to grant a rule on the case as it is presented on the evidence, and I consider the granting of a rule *nisi* when it is not likely to be made absolute, unadvisable: *Regina v. Finkle* (15 C. P. 460).

I expressed my views at some length on the question of granting new trials in criminal cases in the *Queen v. Chubbs* (14 C. P. 32); and cases subsequent to that, in both the superior courts of common law, seem to require that no rule should go in this case, on the ground of the verdict being contrary to law and evidence.

ADAM WILSON, J.—I concur in the judgment just delivered, and have only to add that I am satisfied with the finding of the jury, which I think was perfectly well warranted by the evidence.

MORRISON, J., concurred.

*Rule refused.*

## WIGLE V. STEWART.

*Patent—Description of land—Falsa demonstratio—Statute of Limitations.*

The Crown in 1808 granted the continuation of lots 12 and 13, in the first concession of Gosfield, by two separate patents, describing each as containing 100 acres more or less, and giving metes and bounds, beginning at a certain distance from the south-east angle of each lot on Lake Erie, and extending a fixed distance north, not saying more or less. The front portion had been granted, it was said, in 1790, and it was not shewn whether the line between the first and second concessions had been run in 1808, or at what time. The distances given would carry the land into the second concession, and the defendant claimed the land there covered by the metes and bounds as against the plaintiff, who claimed the lots in the second concession under a later patent.

*Held*, that only land in the first concession would pass by the patents of 1808, for this, in the absence of any proof as to the concession line, was evidently the intention of the Crown, and the description by metes and bounds must be rejected as erroneous.

The plaintiff proved possession of nine acres of the land claimed by him since 1847. Defendant's father died in 1850, defendant being then only about four years old. *Held*, that the plaintiff as to this portion was clearly entitled by possession, for the statute having begun to run against defendant's father would continue as against defendant, notwithstanding her infancy.

THIS was an action of trespass *quare clausum fregit* to parts of lots G. and H. in the second concession, western division, of the township of Gosfield, in the county of Essex.

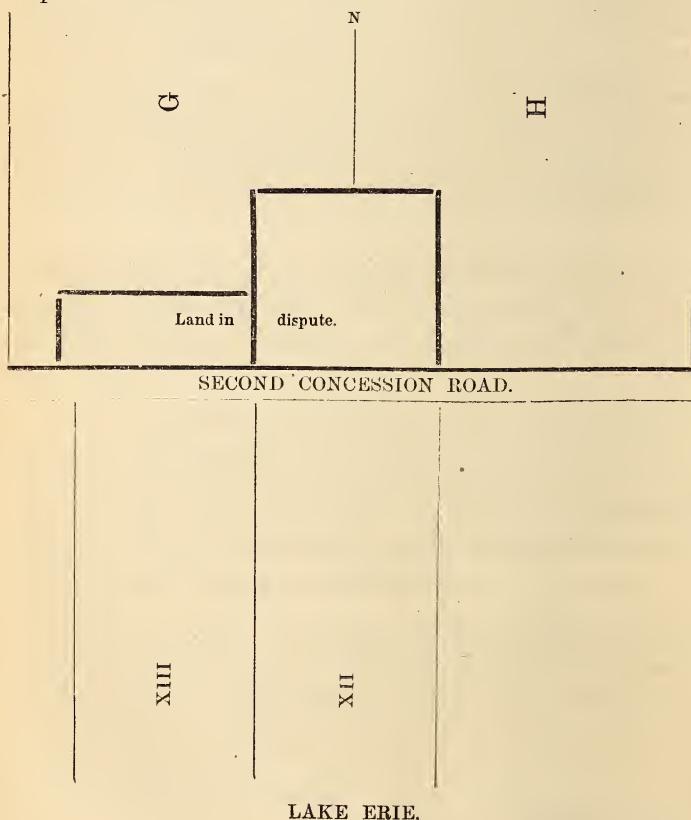
Pleas.—Not guilty, and *liberum tenementum*.

At the trial, at Sandwich, before Becher, Q. C., it was admitted that the plaintiff owned lots G. and H., in the second concession, as described in his declaration, and that the defendant owned the continuation of lots 12 and 13, in the first concession, as described in the patents relating thereto, put in as exhibits, except any portion thereof to which the plaintiff might shew himself entitled by length of possession.

Defendant contended that her patents aforesaid covered a portion of lands in the second concession which otherwise would be part of said lots G. and H., and which is properly the *locus in quo*. The trespass on this *locus in quo* by defendant was admitted.

Plaintiff proved twenty years' possession of a portion of the land trespassed upon, and that those through whom the defendant claimed were aware of such possession, though they thought the land was the plaintiff's by reason of its being beyond the concession line, across which the particular description in defendant's patents extended. But the plaintiff contended that the general description in the patents must govern, and that the grants in these patents were confined to the first concession.

The descriptions in the patent, and the evidence material, are sufficiently stated in the judgment; and the sketch here given will serve to shew the position of the land in dispute :—





Defendant proved that she was an infant under the age of twenty-one years up to within ten years of the taking possession complained of, and claimed that under Consol. Stat. U. C., ch. 88, sec. 45, she was not barred from entry. The plaintiff replied that the statute had commenced to run in the lifetime of the defendant's ancestor, through whom she derived title, and that the statute continued to run upon his death, notwithstanding that she was then under age.

A verdict was entered for the plaintiff, subject to the opinion of the court upon the whole case, reference being made to the notes of the learned Queen's counsel who heard the cause, and the exhibits filed at the trial, which were made part of the case.

The questions for the court were: 1. Whether the defendant's patents covered the land claimed by the plaintiff in the second concession; if not the plaintiff should recover. 2. Whether at all events the plaintiff ought to recover or not by reason of his long possession.

*O'Connor*, for the plaintiff, cited *White v. Meyers*, 10 U. C. R. 574; *Jamieson v. McCollum*, 18 U. C. R. 445; *Iler v. Nolan*, 21 U. C. R. 309; *Petre v. Mailloux*, 8 C. P. 334; *Darby* on Limitations, 307-8.

*Prince*, Q. C., for defendant.

RICHARDS, C. J.—There are two questions which require consideration from us.

It is admitted that the plaintiff is the owner of lots G. and H. in the second concession, western division, of the township of Gosfield, in the county of Essex, and is clearly entitled to recover in this action, unless the patents to Martin Taufflemire in 1808, of the continuation of lots 12 and 13, respectively, in the first concession, western division, of the said township, cover the part now in dispute.

And secondly, if we are of opinion that the patents referred to do cover the *locus in quo*, must the plaintiff still succeed in this action, having shewn that nine acres of the land were fenced and in his possession prior to 1847, and so continued for more than twenty years uninterruptedly.

The defendant contends that if the plaintiff was in possession before 1847, and so continued until 1850, when defendant's father died, and thenceforward to 1867, when defendant got possession, yet inasmuch as defendant was an infant, and brought an action of ejectment within ten years after she came of age, the possession of the plaintiff, though for more than twenty years, cannot deprive her of her estate.

We do not understand there was any evidence offered at the trial to shew when the survey of that portion of the township was made, nor whether at the time the grants of 1808 were made, there was a second concession actually laid out and established or not. No original plan was produced shewing how the lots 12 and 13 in the first concession, western division, were originally laid out. It was stated on the argument that the original patent of the front part of these lots was supposed to have been issued in 1790, to the same person as those for the continuations issued in 1808.

It is also stated that the adverse possession of the plaintiff ought not to be allowed to prevail, inasmuch as it was thought at the time that the lots in the first concession did not extend over the allowance for road between the first and second concessions.

The following are the descriptions of the lots from the government patents :

Grant dated 8th June, 1808, to Martin Taufflemire, of that parcel of land situate in the township of Gosfield, in the county of Essex, in the western district, containing by admeasurement one hundred acres, more or less, being the continuation of lot No. 13 in the first concession,

western division, which said one hundred acres of land are butted and bounded, or may be otherwise known, as follows, that is to say: *Commencing* in the limit between lots numbers 12 and 13, in rear of the lands already granted to the said Martin Taufflemire, at the distance of one hundred and twenty chains on a north course from the south-east angle of the said lot number thirteen upon Lake Erie; then north one hundred and five chains twenty-seven links; then west nine chains fifty links, more or less, to the limit between lots numbers 13 and 14; then south one hundred and five chains twenty-seven links, more or less, to the lands heretofore granted to the said Martin Taufflemire; then east nine chains fifty links, more or less, to the place of beginning.

Grant, dated 10th June, 1808, to Martin Taufflemire, of the township of Gosfield, in the county of Essex, in the western district, of all that parcel of land situate in the township of Gosfield, in the county of Essex, containing by admeasurement one hundred acres, be the same more or less, being the continuation of lot No. 12, in the first concession, western division of the said township of Gosfield, which said one hundred acres of land are butted and bounded as follows, that is to say: *Commencing* in the limit between lots numbers 11 and 12, in the rear of the lands already granted to the said Martin Taufflemire, at the distance of one hundred and twenty-three chains on a north course from the south-east angle of the said lot No. 12, upon Lake Erie; then north one hundred and seven chains thirty links; then west nine chains and thirty-two links, more or less, to the limit between lots numbers 12 and 13; then south 107 chains 30 links, more or less, to the lands already granted to the said Martin Taufflemire; then east nine chains thirty-two links, more or less, to the place of beginning.

There was evidence given at the trial, that if the distances mentioned in the government patents of 1808, describing the continuation of the respective lots north-

ward, be followed, lot 13 would be carried 6 chains and 73 links into the second concession, and lot No. 12 17 chains 17 links. There were  $83\frac{3}{4}$  acres in the continuation of lot No. 12 between its southern boundary and the road between the 1st and 2nd concessions, and  $93\frac{1}{2}$  acres in lot No. 13 between the same lines. The surveyor obtained the starting points of the continuation of these lots, respectively, by going to the lake shore and measuring north from the shore the distance required in each deed. He began at high water mark, where the timber was growing, about a chain from the water. He could not say if the lake had encroached on the land since the patents issued in 1790 or 1808. He did not try to find where the water's edge was at the time the patent issued.

A witness was called, who stated he had known the place forty-five years, and did not think the lake had encroached on the lots. The beach was wide; a few cedar trees might have been washed off, but very little.

In the absence of any evidence to shew that at the time the grant of 1808 was made, the rear of the first concession, western division, of the township of Gosfield was at any different place from what it is now, we fail to see how a grant of the continuation of a lot in the first concession can extend into the second concession. The words of the grant in the beginning seem to contemplate that the lots named were in the first concession: that when the grants were made in 1790 the lots in that concession were not considered to extend the depth they really do extend or that they afterwards were extended to, or appeared to be; and that it was intended to grant the continuation of these lots to the persons to whom the rest of the same lots were originally granted. The evidence given at the trial seemed to shew that the owner of the land under the patents of 1808 never took possession or improved beyond the road between the first and second concessions, whilst the plaintiff appears to have begun to improve on the part now in dispute over thirty years ago, and apparently without



any question that it was part of his lot in the second concession.

It is only the distances mentioned in the deed being fixed as they run north, without saying more or less, to the rear of the concession that makes the difficulty, and gives reason for supposing that in referring to a piece of ground as being the continuation of a lot in one concession, it was intended to grant a piece of land in an adjoining concession, including in it of course the allowance for road between the two concessions.

We have looked at the cases to which we were referred on the argument, or at least such of them as appear to have been reported.

*Martin v. Crow* (22 U. C. R. 485), has reference to land described apparently before any survey was made, but the intention of the Crown to grant a particular piece of land was ascertained by a description of the part made out by the Surveyor General's Department, and referred to in a patent of a piece of land in rear of it, although the land intended to be covered by that description was not in fact granted according to it, but was bounded by the piece of land in rear of it, which was granted first.

But in *Iler v. Nolan et al.*, (21 U. C. R. 309), a question the converse of this arose respecting a lot of land in the township of Colchester. The Crown in 1821 granted to John Snyder in fee 200 acres, more or less, in the township of Colchester, being lot No. 41, in front on Lake Erie, in said township. The lot was described as follows: Commencing in front on Lake Erie, at the south-east angle of the said lot; then north 175 chains; then west 11 chains 46 links, more or less, to the limit between lots 41 and 42; then south 175 chains, more or less, to Lake Erie; then easterly along the shore to the place of beginning. Here the distances running north are fixed, and do not apparently carry that line to the rear of a concession, if there was any concession then laid out.

On the 30th December, 1839, the Crown granted to Charles B. Brush, in fee, by letters patent on a sale, all those

parcels or tracts of land in the township of Colchester, containing by admeasurement 88 acres, be the same more or less, being composed of the rear parts of 41, 42, and 43, in the front or first concession of the said township of Colchester, described as follows: Commencing in the limit between lots Nos. 40 and 41, at the distance of 175 chains, on a course north, from the south-east angle of said lot No. 41; then north 25 chains 50 links, more or less, to the allowance for road in rear of the said concession; then west 34 chains 71 links, more or less, to the limit between lots 43 and 20; then south 25 chains 50 links, more or less, to lands heretofore granted to Thomas Ferris in lot 43; then east 34 chains 71 links, more or less, to the place of beginning.

In giving judgment the learned Chief Justice, Sir J. B. Robinson, refers to the grant not being in any range or concession, but as being lot 41 in front on Lake Erie, and containing 200 acres, more or less, and describing the length of the lot from the south-east angle on the lake as 175 chains absolutely, without the addition more or less, or without saying that such eastern side line is to go to any concession line or other line in rear. "The government," he says, "we can have no doubt, meant to give Snyder 200 acres, and not more or less. \* \* \* If the patent to Snyder had only professed to grant a part of lot No. 41 on Lake Erie, then it would have been quite plain that the north end of the 175 chains would be the northern limit on the east side, and that a line due west from that would have been the rear limit of the whole lot; but the patent grants lot 41, and not merely a part of it. It grants, therefore, the whole of that lot, just as a patent for any other lot is always understood to carry the whole lot, without regard to its exact contents, or the expressed length of its side lines, or its nominal width."

The following passage occurs in the judgment, which applies with equal force to the case before us:—"The probability is that the government placed settlers on the front of the township long before they issued patents to them, and before they had surveyed the rear into conces-

sions; and that, leaving it for the present undetermined where the boundary should be of the first range of full lots in rear, they made grants in front which, according to the size, might leave more or less land still vacant between them and the line in rear, to be afterwards laid out as a concession line."

This was probably the case when the front parts of these lots were patented. Whether at the time the patents of 1808 were issued the concession line in rear of the first concession had been run or not, is not shewn by the evidence. Such a line is traced on the ground, and the plaintiff owns land in the second concession which was granted up to that line, and the patent under which the defendant claims speaks of the continuation of a lot in the first concession, whilst it is admitted the land in dispute is within the boundaries of the second concession, but it is contended it is a continuation of a lot in the first concession.

We have not the patents of 1790 before us, so that it does not appear if the lots by them are granted as being in the first concession, or certain lots in front on Lake Erie, in the township of Gosfield; nor have we any information how those lots were "*continued*" beyond the distance described in the patents of 1790,—whether after those lots were granted, or whether they as originally laid out were "*continued*" beyond the point called for by the description in the patents first issued. It is possible that the grants of 1790, under the ruling of the court in *Iler v. Nolan*, may have covered the whole of the respective lots to the rear of the first concession.

If then the lots by the patents of 1808 had been simply granted by saying all that parcel of land in the township of Gosfield, containing by admeasurement one hundred acres, more or less, being the "*continuation*" of lots 12 and 13 respectively, in the first concession of the western division in the said township, in rear of those portions of the said lots already granted to the said Martin Taufflemire, to hold in fee—then I apprehend the portion of them in rear of what had been previously granted up to the concession line between the first and second concessions would

have passed. Does the Crown by this deed intend to do more than that, and is not what follows a mistaken description of it?

I make a further quotation from the judgment of Sir J. B. Robinson in *Iler v. Nolan*—"It is a clear principle of law, which has always been acted upon in England, and in our courts here, that if a lot or close be granted by a certain name, and it can be clearly shewn what land the lot or close so named contains, the lot as named is the governing feature in the description, and it will pass by the grant according to its real contents, notwithstanding an erroneous description of it, which, if literally carried out, would either narrow or extend the quantity of land. As, for instance, if one grants lot A, and in describing it describes it improperly, lot A will nevertheless pass according to its real boundaries and contents. We mean that this is a general principle, to which however the facts of a particular case may, on good grounds, sometimes constitute an exception."

If I understand the evidence correctly, the plaintiff and his brother own the land which was supposed to be covered by the grants of 1790. Defendant owns what may be considered as the continuation of the same lots. And defendant and those under whom she claims hold land south of a road running across the lots, and claim to extend the north boundary across the concession road; yet the defendant, in measuring to ascertain where the lot would extend to in the rear, measures a distance of some forty chains north from the centre of the road referred to. The defendant, as I understand it, has thus much more than the one hundred acres in each lot, if their southern boundary extends south beyond the intersection road, 100 acres being the quantity called for by each patent. This is not very clear from the evidence, but that is the way I understand it.

On the whole, as to this point, I think we should decide in favor of the plaintiff. *Primâ facie*, the patent under which he claims covers the land. The defendant wishes to displace that title by simply producing a patent



of an older date under which she claims, which, if the mere metes and bounds be followed, as in the recent survey of it, on the description given in the patent would extend a lot purporting to be in the first concession into the second concession. We do not think the erroneous description of this lot, extending it into the second concession, must be followed, unless there is some more satisfactory evidence to shew that such was the intention. The condition of the coast at the starting point on Lake Erie is spoken to by but one person, who says he has known it for forty-five years, and does not think the lake has encroached much on the shore; and yet if it has, and the surveyor made no allowance for that, his starting point might be anything but correct, and might be seventeen or eighteen chains too far north on one, and six or seven chains on the other, if the lake there encroaches or has encroached on the land to anything like the extent that has prevailed on other parts of the coast of our great lakes.

As to the title claimed by prescription, the plaintiff appears to have taken possession of part of the land in question as long ago as 1835, and remained continuously in possession until the 26th November, 1867. The plaintiff proved the making of a fence to complete the enclosure of the whole of the nine acres in September, 1847. The defendant's father died in 1850, and was said to be about 40 years old when he died. The defendant was said to be about 21 or 22 years of age at the time of the trial. It is urged that the prescriptive right cannot run against her, because she was a minor when the plaintiff's possession began, and therefore she comes within the exceptions of the statute. It clearly appears, as I understand the evidence, that the statute began to run before the death of the defendant's father. I have always understood the rule to be, that whenever the statute begins to run it continues to go on, notwithstanding the disabilities from absence, coverture, or similar causes, which might sometimes bring a party claiming within the exceptions contained in the statute. Mr. Prince has not

referred us to any case supporting his view, and we have not been able to find any.

I do not understand that the nine acres actually enclosed by the plaintiff covers all that is now in dispute between the parties. If the defendant did not wish the failure to defend herself successfully as to those nine acres to prejudice her, she might have defended as to all but those nine acres, and allowed the plaintiff to succeed as to them. We might possibly mould the record and verdict, as the matter is now left to us, in such a way as not to prejudice defendant's claim to the rest of the land in dispute, if we thought her entitled to any of it. But as in the view we take she has failed to make good her right to any of it, we think the postea should go to the plaintiff.

ADAM WILSON, J., concurred.

MORRISON, J., not having been present during the argument, took no part in the judgment.

*Judgment for plaintiff.*

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#### MEMORANDA.

During this Term the following gentlemen were called to the Bar :—EDWARD CLARKE CAMPBELL, JOHN O'DONOHUE, ALBERT GEORGE BROWN, AARON ISRAEL DUNNING, WILLIAM G. MCWILLIAM, GEORGE TAILLON, HENRY HATTON STRATHY, WILMOT RICHARDS SQUIER, JOHN HENRY GRASETT HAGARTY, WILLIAM MANDEVILLE MERRITT, COLIN MACDOUGALL, ALFRED JOHN WILKES, NEIL MALCOLM MONRO.

## IN THE COURT OF ERROR AND APPEAL.

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### DARLING ET AL. V. HITCHCOCK.

*Promissory note payable in L. C.—Limitation of action—12 Vic. ch. 22 sec. 31.*

A., residing in Upper Canada, made a note there payable to B., also a resident of Upper Canada, at the Bank of British North America in Montreal, and B. endorsed it to the plaintiffs, who carried on business in Montreal. Neither A. nor B. had ever resided in Lower Canada.

12 Vic. ch. 22, sec. 31, enacts, that all notes payable in Lower Canada shall be held and taken to be absolutely paid and discharged, unless sued upon within five years after they become due.

*Held*,—reversing the decision of the Queen's Bench, founded upon *Hervey v. Jacques*, 20 U. C. R. 366,—that the plaintiff in this case, suing here after the lapse of five years, was not barred, *Adam Wilson, J.*, dissenting.

*Draper, C. J.*, held that the statute, being applicable to Lower Canada only, did not change the limitation of actions on contracts made in Upper Canada by persons resident there; and that this note being payable in Montreal, without any limitation of not otherwise or elsewhere, was payable generally, and so not within the statute.

The rest of the court proceeded upon the latter ground only.

THIS was an action upon three promissory notes. At the Spring Assizes in Toronto, in 1866, the plaintiffs had a verdict, which in Easter Term afterwards was set aside and a new trial granted, and during the same term judgment was given for the defendant John Goldsmith Hitchcock on the demurrer to the replication. The judgment on the motion for new trial and upon the demurrer are reported in 25 U. C. R. 463, where the pleadings are stated.

Afterwards, at the Fall Assizes in 1866, before John Wilson, J., a verdict, under the direction of the learned judge, was found for the plaintiffs—damages assessed against Buell Thomas Hitchcock at \$1,092.86. and a verdict for the plaintiffs against the defendant John Goldsmith Hitchcock, on the issues joined on the common counts, for the sum of \$59.95, and for said defendant John Goldsmith

Hitchcock on all the issues joined to the first three counts, with leave to the plaintiffs to move to increase the verdict against the defendant John Goldsmith Hitchcock by \$1,039.91, if in law the plaintiffs were entitled to recover the same.

In Michaelmas Term following, a motion was made on behalf of the plaintiffs accordingly.

The court refused to grant a rule *nisi*; and from the decision refusing such rule the plaintiffs appealed, for the following reasons :—

1. That as the promissory notes in the declaration mentioned bear date and were in fact made and endorsed at Cornwall, in Upper Canada, and as both the makers and also the endorser resided in Cornwall, and never had any domicile in Lower Canada, the Statute 12 Vic., ch. 22, sec. 31, referred to in the plea of the defendant John Goldsmith Hitchcock, does not apply, and the remedy of the plaintiffs in the courts of Upper Canada on said notes is not barred by the lapse of five years from maturity of the notes.

2. That as, from the fact of the notes being made and the defendants residing in Upper Canada, no action could, according to the laws of Lower Canada, be brought there against the defendants on said notes, the said statute should be no bar to the plaintiffs' recovery in the courts of Upper Canada, though five years had elapsed from maturity of the notes.

3. That the action having been brought within six years from the maturity of any of the notes, the plaintiffs are entitled to recover for the amounts thereof in this action.

*James Paterson*, for the appellants (*a*). The defence relied upon arises under 12 Vic. ch. 22, sec. 31—(See the section extracted at length in the judgment, page 444–5). The notes are made and dated at Cornwall, where the

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(*a*) The case was argued on the 3rd January, 1867, before Draper, C. J. of Appeal, Richards, C. J., VanKoughnet, C., Spragge, V. C., Mowat, V. C., Morrison, J., Adam Wilson, J., and John Wilson, J.



maker resided, and the plaintiff could not sue in Lower Canada, because the contract was made and the domicile of all the parties is in the upper province.

*Ridout v. Manning*, 7 U. C. R. 35, decides that this statute applies only to Lower Canada, and this appears further from the Consolidated Statutes since passed. The fourth section only is to be found in the Consol. Stat. U. C., and it is introduced there, not from the 12 Vic. ch. 22, but from 7 W. IV. ch. 5, sec. 2, with which it is identical.

Assuming then, first, for the sake of argument, that these notes are payable in Lower Canada, the question is what law must govern. No case yet decided on the statute is exactly like this, for in *Hervey v. Jacques*, 20 U. C. R. 366; *Hervey v. Pridham*, 11 C. P. 329, and *Sheriff v. Holcombe*, 13 C. P. 590, 2 E. & A. 516, the notes were made in Lower Canada. If either the *lex loci contractus* or the *lex fori* is to govern, the plaintiffs must succeed, for they are the same, and in most cases the question has been between these; if the *lex loci solutionis*, then he must fail. In *City Bank v. Ley*, 1 U. C. R. 192, and in *Rothschild v. Currie*, 1 Q. B. 43, it was held that the law of the place of contract must be looked to, but in each case the action was against the endorser, and it was held that the notice to the endorser was part of the contract, and the place of payment as against him was the place of contract. Here the action is against the maker. In *Matthewson v. Carman*, 1 U. C. R. 259, it is intimated that *Rothschild v. Currie* has been questioned. *Westlake* Int. L. secs. 204, 225, 248-252; *Burrows v. Jemino*, 2 Str. 733; *Potter v. Brown*, 5 East 124; *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lippman*, 5 C. & F. 1. The makers here never resided in Lower Canada; the law of that province therefore never had any application to them, and it is immaterial whether the effect of the statute is to extinguish the claim or to bar the remedy only. It is true that the act was one passed by our own legislature, but it is exclusively applicable to one province only, as has been decided, and the words "shall be held

to be absolutely paid," &c., must be read "shall be held in Lower Canada."

But so far the note has been assumed to be payable in Lower Canada, which is not the case. It is to be paid at the Bank of British North America in Montreal, not adding any such words as "and not otherwise or elsewhere," and it is therefore payable generally: Consol. Stat. U. C. ch. 42, sec. 5; *Commercial Bank v. Johnston*, 2 U. C. R. 126; *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C. 531; *Price v. Mitchell*, 4 Camp. 200; *Williams v. Waring*, 10 B. & C. 2; *Exon v. Russell*, 4 M. & S. 505.

*Kerr*, for the respondent. It is not necessary to determine whether the law of the place of contract or payment is to govern, for it has already been determined that the 12 Vic. ch. 22, is an Act of Upper as well as of Lower Canada. In *Hervey v. Jacques*, 20 U. C. R. at p. 370, this is put as strongly as possible. Sir John Robinson, in giving the judgment of the court, there says "As to all persons domiciled in Canada, either Upper or Lower, it is not the statute law of a foreign country that we have in this case to apply, but a statute of our own country, as binding upon the people of the upper portion of the province, as of the lower. We are not asked to admit its operation merely upon the ground of comity of one independent nation or people towards another, but the statute in itself is a direct binding obligation upon us, and upon all persons for whom the legislature of Canada has authority to make laws." So in *Sheriff v. Holcombe*, per Adam Wilson, J., p. 598-9. In the same case in Appeal, 2 E. & A. 522, it is said by Spragge, V. C., "We do not give effect to it from the comity of nations; it is *binding* upon the courts of Upper as well as Lower Canada." And by Morrison, J., p. 524, "This is not the case of a foreign law. It is our own legislature that speaks; and if the legislature had in contemplation that the clause in effect should be read as contended for by the plaintiffs, that any such note, when prosecuted in the courts

of this section of the Province, should be subject only to the Statute of Limitations in Upper Canada, it would, I think, have so manifested its intention by express words." These authorities have held that the statute is as well the law of Upper as of Lower Canada, and the language of it is wide enough to bring this note within its provisions. [VANKOUGHNET, C.—If the note were made in London, payable in Lower Canada, I feel clear no English court would hold themselves bound by this act.] The case of *Sidaway v. Hay*, 3 B. & C. 12, affords a more apt illustration. There a debt contracted in England by a trader residing in Scotland was held barred by a discharge under a sequestration issued according to 54 Geo. III. ch. 137, in the same way as if it had been contracted in Scotland—Abbott, C. J., in giving judgment said, "The statute is an act of the Parliament of the United Kingdom competent to legislate for every part of the kingdom, and to bind the rights of all persons residing in *England*, equally with those of persons residing in *Scotland*." [VANKOUGHNET, C.—You say then that the act means all notes wherever made?] Yes, within the jurisdiction of this Parliament.

But in this case, on general principles, the *Lex loci solutionis* should govern: *Byles on Bills*, 9th ed., 383; *Robinson v. Bland*, 2 Burr. 1077-8; *Rothschild v. Currie*, 1 Q. B. 43; *Allen v. Kemble*, 6 Moo. P. C. 314; *Stor. Confl. L. secs. 280, 281, 582 b*; *Andrews v. Pond*, 13 Peters 65; *Frazier v. Warfield*, 9 Smedes and Marshall, 220; *Lincoln v. Battelle*, 6 Wend. 475; *Shelby v. Grey*, 11 Wheat. 361, 371-2; *Beckford v. Wade*, 17 Ves. 91; *Mostyn v. Fabrigas*, 1 Sm. L. C. 659, 5th ed.

As to the argument that the note is not payable in Lower Canada, but is payable generally, under Consol. Stat. U. C. ch. 42, secs. 5, 6: that ground was never taken before, nor has it been raised in the reasons for appeal, and it cannot now be urged. Objections not taken in the reasons for appeal will not be heard by the court, the case being stated for the argument of such grounds only as are stated therein. Facts not stated might in any case be shewn to

meet objections not so stated. But the objection is not valid, for the sections relied on were taken from 7 Wm. IV. ch. 5, which was in force when the enactment relied on by defendants was introduced, 12 Vic. cap. 22, sec. 31. The words of that section are, "All bills, whether foreign or inland, and all notes due and payable in Lower Canada,"—that is, whether payable in any particular place, or payable generally, in Lower Canada. The intention was to qualify or control the law as it then stood; and this is made clear, as the section relied on by the appellant was re-enacted at the same time: 12 Vic. ch. 22, sec. 7; Consol. Stat. U. C. ch. 42, secs. 5, 6: Consol. Stat. L. C. ch. 64, sec. 9; and there is nothing in this act limiting the application of section 31 to Lower Canada, any more than section 7, which is the section relied on by the appellants.

August 25th, 1868. The following judgments were delivered:

DRAPER, C. J. OF APPEAL.—The case may be condensed as follows: A., being a resident in Upper Canada, in August, 1859, makes a promissory note drawn payable at Montreal, in Lower Canada, in favor of B., also a resident of Upper Canada, or his order, and B. endorses it to the plaintiffs, who carry on business in Montreal. Neither the maker nor the endorser ever lived in Lower Canada, and if there was a consideration moving between A. and the plaintiffs, upon which the note was based, it does not appear by the plea, though it may be and not improbably is the fact, that the note was made for goods purchased in Montreal, that the plaintiffs were the vendors, and that B. only endorsed for the accommodation of A.

This action was brought more than five and less than six years after it became due. The defence is founded upon the statute of Canada, 12 Vic., ch. 22, sec. 31: "All bills, whether foreign or inland, and all notes, due and payable in Lower Canada at the time when this act shall come into force, shall be held and taken to be absolutely paid and



discharged, if no suit or action is brought thereon within five years next after the day on which such bills or notes shall become due and payable, and all such bills and notes made and not due when, or to be made after this act shall come into force, shall be held and taken to be absolutely paid and discharged if no such suit or action is brought thereon within five years next after the day on which such bills or notes shall become due and payable."

In *Story's Conflict of Laws* (sec. 577) the learned writer observes: "It has accordingly become a formulary in international jurisprudence that all suits must be brought within the period prescribed by the local law of the country where the suit is brought, (*lex fori*), otherwise the suits will be barred." I take it to be equally true, as a general proposition, that a plaintiff has the full period prescribed by such local law for bringing his suit before it will be so barred. In a thoroughly considered judgment in *De la Vega v. Vianna* (1 B. & Ad. 284), Lord Tenterden says: "A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of the kingdom are entitled to."

*The British Linen Company v. Drummond* (10 B. & C. 903), and *Huber v. Steiner* (2 Bing. N. C. 202) are clear to the same effect. I abstain from repeating observations on such cases which I made in the comparatively recent case of *Hervey v. Pridham* (11 C. P. 329).

I think it not immaterial to observe that the statute 12 Vic., ch. 22, repealed a previous statute of Lower Canada, 34 Geo. III. ch. 2, which related to promissory notes only, and the 8th section contained a provision as to such notes in substance precisely similar to the 31st section of the 12 Vic. We have in that statute of 1794 the law of Lower Canada limiting such suits to five years, and extinguishing the cause of action if not brought within that period.

In the year following the passing of the 12 Vic. ch. 22, our Court of Queen's Bench was called upon to decide whether it was confined in its general operation to Lower Canada, or whether it extended also to Upper Canada. The unanimous decision (Sir John Robinson, C. J., my late brother Burns, and myself, JJ.,) was that it was so confined: *Ridout v. Manning* (7 U. C. R. 35). The point now in dispute was not adverted to.

*Hervey et al. v. Jacques* (20 U. C. R. 366) in its facts more nearly resembled the present case. The defendant, the maker, resided in Lower Canada, where the note was made and was payable. The payee and endorser was a resident in Upper Canada at the time of the endorsement, and while he held the note carried on business in Lower Canada; and after it was due, and while he held it, and more than five years before the commencement of the suit, he met the defendant in Lower Canada and might then have sued him. The Court of Queen's Bench (Sir J. Robinson, C. J., McLean and Burns, JJ.,) held the action was barred, apparently on the broad ground that the statute is "as binding upon the people of the upper portion of the Province as of the lower," though it is added: "We have these circumstances concurring, that by the words of the statute, binding upon us a contract *made in Lower Canada*, and to be performed there, is declared to be in effect discharged under such facts occurring as are stated to have occurred in this case. The party, besides, *who made the contract* and is sued upon it, and who on the general principles of the law the debt is held to follow, has been always since resident in Lower Canada."

In the following term the Court of Common Pleas decided, in *Hervey v. Pridham* (11 C. P. 329), that where the maker and payee both resided in Upper Canada, and the note then in question was made there payable in Lower Canada, the action was not barred, Richards, J., now the learned Chief Justice of that court, dissenting. The conclusion of the majority was, that the section in question rather applied to the remedy to enforce the contract, than

governed or affected its interpretation, and that no part of the act indicated an intention to do more than affect rights claimed and proceedings instituted in Lower Canada.

Then in *Sheriff v. Holcombe* (13 C. P. 590), the court took the same view of the effect of the statute as the Court of Queen's Bench had taken in *Hervey v. Jacques*. There, however, the note was made in Lower Canada as well as payable there, and was also endorsed there by the firm of which the defendant was a member; but Adam Wilson, J. who delivered the judgment, rested the conclusion in favor of the defendant upon this, that "because this statute is not to be treated as a foreign law, but is a self-enacted internal law, it is for the purposes of this defence operative here and binding upon us, and I am obliged to hold that its enactments do, when the prescription is complete, directly affect the rights and merit of the contract, and do relate *ad litis decisionem*, and that this doctrine, although not adopted by us from the foreign comity, has, in my opinion, been imposed upon us by our own legislature, and must therefore be the rule for our decision." This decision was affirmed in Appeal: (2 E. & A. 516).

I cannot agree with the decisions in *Hervey v. Jacques* or in *Sheriff v. Holcombe*, if they assert or tend to assert that the section of the statute which I have set out above applies or was intended to apply to a case like the present, or to change the law of Upper Canada as to limitations of suits, founded upon contracts made in Upper Canada by persons resident therein.

I refer, in the first place, to the enactments of the Legislature of the Province of Canada as throwing great light upon this question.

Of the 32 sections of the 12 Vic., ch. 22, only two are consolidated as forming part of the statutes of Upper Canada, viz., the fourth and the third. The fourth was part of the law of Upper Canada before the union, and was virtually extended to or adopted for Lower Canada. The whole act (12 Vic.) is omitted from the Consolidated Statutes of Canada, while the Consolidated Statutes of Upper Canada

rightly contains this section, part of its own law. The same observation applies to section 23, which was also the law of Upper Canada before the union, being the third section of 7 Wm. 4, ch. 5.

The Legislature of Canada passed three acts—one relative to the Consolidated Statutes of Canada, another as to those of Upper Canada, a third as to those of Lower Canada. Each of these acts declares that as soon as the respective Consolidated Statutes come into force, “all the enactments in the several acts and parts of acts” in schedule A. to each act “mentioned as repealed shall stand and be repealed,” subject to some exceptions which do not affect this case. In schedule A. to the Consolidated Statutes of Canada, this act (12 Vic.) is not named, nor yet in the corresponding schedule of the Consolidated Statutes of Upper Canada, while in the schedule A. to the Consolidated Statutes of Lower Canada 12 Vic. ch. 22 is expressly mentioned.

I infer from this that the Legislature regarded this statute (with the exception of the 4th and 23rd sections) as exclusively applying to Lower Canada. They consolidated it as a statute affecting only that part of the Province of Canada, and it was repealed when the Consolidated Statutes of Lower Canada came into force—*i. e.*, on the 31st January, 1851.

I may add, in confirmation of my own opinion, that in the Consolidated Statutes of Lower Canada, ch. 64, this particular section is classed and arranged under the heading “Actions on bills and notes,” together with other sections which almost entirely relate to procedure; and further, that the recital to the Statute of Canada 23 Vic., ch. 56, begins with these words: “Whereas it has been found expedient to revise, classify, and consolidate, the public general statutes which apply *exclusively* to Lower Canada.”

I have perhaps labored this point unnecessarily, and it may be that it will be conceded that the statute as a whole is applicable to Lower Canada only, but that as the



Legislature of *Canada* passed the act, the satisfaction or extinction of the remedy must extend to the whole territory, binding all courts over which the authority of that legislature extended. But I must further observe that, although in a great number of Statutes of Canada a clause has been added that the act shall apply only to Upper or Lower Canada, as the case may be, there are likewise a great many in which no such clause has been introduced, because, as I presume, the purpose of the act was so palpably local as to render it unnecessary, and the reasons I have already advanced appear to me to place this act in the latter category. Assuming that is so, then the point in dispute is reduced to the question whether this particular section escapes, as it were, from the restriction to Lower Canada which limits the application of its other provisions. If this be a just view of the question, it throws any weight of presumption as to the intention of the Legislature in the appellant's favor.

In support of my conclusion that this 31st section is not to be construed as less local in its application than the other sections, I will refer again to *Ridout v. Manning* (7 U. C. R. 39), in which Sir John Robinson, C. J., says, "Neither do I believe that the Legislature could have designed the 26th and 31st clauses to apply here," (*i.e.* in Upper Canada), "for the first establishes holidays which are some of them unknown in Upper Canada; and the last alters the general period of time for the limitation of actions from six years to five."

The soundness of the conclusion in *Ridout v. Manning* has not, that I am aware of, ever been brought in question. In the several cases in which sec. 31 has been discussed, it has never been argued at the Bar or asserted on the Bench that the act, apart from that section, is not limited to Lower Canada. Now if the plain and unambiguous language of the 31st section prevents the court from importing into it any words which will restrain their generality, why should not the same effect be given to the 26th? There is nothing obscure or ambiguous in

these words, "*None other* than the New Year's or Circumcision Day" (and several other days named) "shall be deemed and taken to be a holiday within the meaning of this Act." This section has to be read in connection with section 5, which fixes an hour at which the third day of grace shall expire, unless the third day shall fall on a Sunday or holy-day, when the day next preceding, not being a Sunday or holy-day, shall be the last of the days of grace. Notwithstanding the negative form of sec. 26, it has always been treated as affirmatively declaring what are the holidays in Lower Canada, differing from those established among us. This 26th section has never been held to have effect in Upper Canada; it has been acted upon by importing into it such words as "in Lower Canada," none other than the New Year's day, &c., &c. Why may not similar words be imported into the construction of section 31, and the latter part of the section be read, "and all such bills and notes made and not due when, or to be made after this Act shall come into force, shall *in Lower Canada* be held and taken to be," &c., unless, &c.? The 14th and 16th sections of the Act may be referred to as requiring a similar restriction.

Treating this Act then as applying to Lower Canada only, and conceding that in Lower Canada the plaintiffs' claim and title is thereby extinguished, I do not think it can so operate here. For, I must repeat, the contract was made in Upper Canada by parties residing there, with a party also residing there, and neither maker nor payee ever resided in Lower Canada; and moreover, according to the second replication, which, for the purpose of the demurrer is admitted, the plaintiffs could not have impleaded the defendant in any court in Lower Canada.

I conclude, therefore, that in this case (if in any) the *Lex loci solutionis* cannot prevail against the *Lex loci contractus* and the *Lex fori*. If, (and it so appears to me), these notes being made in Upper Canada, though payable in Montreal, without any limitation of not otherwise or elsewhere, were payable generally, so that presentment in

Montreal was not indispensable, it fortifies my conclusion that the defence cannot be sustained.—See Statute of Canada, 13 & 14 Vic. ch. 23.

I will refer again to the case of *Sidaway v. Hay* (3 B. & C. 12), which was commented on in *Hervey v. Pridham*. Fully recognizing the competency of the Legislature to bind all parties, both in Upper and Lower Canada, the question still remains, did the Legislature intend that this act should have the effect contended for by the defendants. I not only do not find in the act sufficient internal evidence of such an intention, but it seems to me there is clear evidence of an intention to the contrary. I think this 31st section is to be construed, not by the apparent or actual meaning of the words used therein, taken *per se*, but read and construed with the other parts of the statute, and that such a construction does not support the defence.

In my opinion the appellants should have judgment.

A large majority of my brothers concur in this conclusion, but exclusively on the ground that the note was payable generally : that presentment in Lower Canada was unnecessary, and it cannot be held to have been payable there more than in this province ; and therefore the limitation created by the law of the sister province does not govern.

ADAM WILSON, J.—The defendant made three promissory notes, dated at Cornwall, payable to the order of one Hitchcock at the Bank of British North America in Montreal, and by him endorsed in blank at Cornwall to the plaintiffs. The defendant at the making of these notes resided at Cornwall and carried on business there. The payee and endorser was a resident there also. The plaintiffs then and since have carried on business and have their domicile at Montreal, and the notes were so made for the convenience and at the request of the plaintiffs, for their business purposes in Montreal. The first question is, where were they payable ?

The place of payment being expressed by the makers to be in Montreal, but the notes containing no restrictive words according to our law, are they to be construed as payable generally, according to our law, or payable at a particular place, according to the law of the former Province of Lower Canada ?

“Where the contract is, either expressly or tacitly, to be performed in any other place” (than the place it was made) “there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice; and the Roman law has adopted it as its maxim: *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit.*” *Stor. Conf. L.*, sec. 280.

In *Robinson v. Bland* (2 Burr. 1078), Lord Mansfield, C. J., said : “The law of the place can never be the rule, where the transaction is entered into with an express view to the law of *another* country, as the rule by which it is to be governed.”

And according to *Rothschild v. Currie* (1 Q. B. 43) these notes, for some purposes at any rate, must be taken as against the makers to have been made in Montreal, though actually made in Cornwall, and as instruments be governed by such foreign law. The form of protest, the time of making it, and of notifying the parties in case of dishonor, must as parcel of the contract be conformable to the foreign law and not to the law of this country. See also *Hirschfeld v. Smith* (L. R. 1 C. P. 340).

In many respects the *lex loci contractus* must govern, for “all the formalities, proofs or authentications which are required by the *lex loci* are indispensable to their validity everywhere else. \* \* \* Thus, if by the laws of a country a contract is void unless it is written on stamp paper, it ought to be held void everywhere; for unless it be good there, it can have no obligation in any other country. It might be different, if the contract had been made payable



in another country, or if the objection were not to the validity of the contract, but merely to the admissibility of other proof of the contract in the foreign court, where a suit was brought to enforce it :” *Story’s Conf. L.*, secs. 260–262.

Contracts which must be in writing by the law of the country where they are made cannot be enforced in another country, though writing in this latter country is not required : sec. 262. And the contrary rule also applies ; if no writing be necessary where the contract is made, it is not necessary where the contract is enforced : *Ibid*, also section 285.

Then again it is said : “ The law of the place of the contract is to govern as to the nature, the obligation, and the interpretation of the contract. \* \* \* Thus, whether a contract be a personal obligation, or a real obligation ; whether it be conditional, or absolute ; whether it be the principal, or the accessory, whether it be that of principal or surety ; whether it be of limited or of universal operation ; these are points properly belonging to the nature of the contract, and are dependent upon the law and custom of the place of the contract, whenever there are no express terms in the contract itself, which otherwise control them. By the law of some countries, there are certain joint contracts, which bind each party for the whole, *in solido* ; and there are other joint contracts, where the parties are, under circumstances, bound only for several and distinct portions. In such case the law of the place of the contract regulates the nature of the contract, in the absence of any express stipulations. These may, therefore, be said to constitute the nature of the contract.” Sec. 263.

It is also said, as to the interpretation of contracts :—“ There would scarcely seem to be any room for doubt or disputation. There are certain general rules of interpretation recognized by all nations, which form the basis of all reasoning on the subject of contracts. The object is to ascertain the real intention of the parties in their stipulations ; and when the latter are silent, or ambiguous, to

ascertain what is the true sense of the words used, and what ought to be implied in order to give them their true and full effect. \* \* \* If the full and entire intention of the parties does not appear from the words of the contract, and if it can be interpreted by any custom or usage of the place where it is made, that course is to be adopted :” sec. 270. See this passage commented on in *The Peninsular and Oriental Steam Navigation Co. v. Shand* (3 Moo. P. C. N. S. 272.)

Thus the term usance in some countries means a month, in others two or more months, and in others half a month. A note payable at one usance must be construed everywhere according to the meaning of the word in the country where the contract is made : sec. 271.

The same rule applies to the value of money ; and if a note were dated in Dublin for £100, and sued in England, the money would be Irish money if no place of payment was named, because the note would be payable in Ireland ; but if it were payable in London it would be English money : Sec. 272.

“The general rule, then, is, that in the interpretation of contracts the law and custom of the place of the contract are to govern in all cases where the language is not directly expressive of the actual intention of the parties, but it is to be tacitly inferred from the nature, and objects, and occasion of the contract :” sec. 272.

And our law is clear, that in case a person makes a promissory note payable at a bank or at any particular place, without further expression in that respect, such promise shall be deemed and taken to be a general promise. If these notes are to be governed by the law of this country because they were made here, then they were not in strict law payable in Montreal, but payable generally, that is, payable in this Province and payable everywhere.

I think these notes are to be construed by the law of the place of performance, in conformity to the presumed intention of the parties, for the fact that they were made in their present form at the request and for the convenience

of the plaintiffs, who resided and did business in Montreal, is very cogent evidence as to the intent of the parties, that the notes were made with a view to the law of the other province; and the conclusion is quite warranted by the authorities to which I have referred, for, "there are express terms in the contract itself, which control" the general effect which would be given to the notes by the law of the mere place of contract.

The question then is whether these notes, payable in the other province, and afterwards sued in this province, are subject to the prescription of that province, which extinguishes these contracts after the term of five years, if no action is brought upon them before that time.

The law of the other province is very plain. It is by virtue of the statute passed in 12 Vic. ch. 22, sec. 31, during the union, and is contained in the Consol. Stat. L. C. ch. 64, sec. 31. The provision is that "all bills, whether foreign or inland, and all notes, due and payable in Lower Canada \* \* , or made after the said day, (1st of August, 1869), shall be held to be absolutely paid and discharged, if no such suit or action has been brought thereon within five years next after the date on which such bills or notes became due and payable."

It is not necessary to say that this law would be binding in any other countries than in the two provinces of Quebec and Ontario, in order to make it binding upon us here, for it is most likely it would not be given effect to in other countries, unless the contract was made in Quebec, and the parties during all the period of prescription continued to reside within its jurisdiction.

There is a special reason why this law should extend to us and be given effect to here, which does not apply to other countries.

It is that this province, in conjunction with Quebec, during the union of the two, enacted this law for that section of the province, which is general and unqualified, and applies to all bills *foreign* or inland, and to all promissory notes due and payable in Lower Canada; and therefore

I think we are bound to carry it into effect when relied on as a defence in all matters and contracts between the two provinces, in like manner as the courts of the other province would give effect to it if the action were brought there.

Whether we should give effect to it in other cases, and to the same extent that would probably be done in the other part of the Province, I am not prepared to say. There are difficulties in the application of it to all cases, and to the contracts of other countries, which might be unjust, which do not seriously or at all apply to ourselves.

I think the defence pleaded to be a good bar to the action.

RICHARDS, C. J., VANKOUGHNET, C., SPRAGGE, V. C., MORRISON, J., and MOWAT, V. C., concurred with Draper, C. J., but rested their opinion on the ground that the note was payable generally, and presentment in Montreal was therefore necessary.

*Appeal allowed.*

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## SCRAGG V. THE CORPORATION OF THE CITY OF LONDON.

*Assessment—Property belonging to corporation.*

*Held*, affirming the judgment of the Queen's Bench, that land owned by a city, but leased by them to a tenant for his own private purposes, was liable to taxation, and that the corporation might distrain for such taxes.

*Morrison*, J., dissented, on the ground that the land was not liable; *VanKoughnet*, C., and *Spragge*, V.C., on the ground that, though the corporation might sue on the covenant to pay, they could not distrain.

ERROR from the judgment on demurrer in this case in favor of the plaintiff, reported in 26 U. C. R. 263, where the pleadings are set out at length.

The question in substance was, whether land belonging to a municipal corporation, and leased by them to a tenant for his own private use, was liable to taxation under the Assessment Act, Consol. Stat. U. C., ch. 55, and whether the corporation could distrain, the tenant having by the lease covenanted to pay taxes. The court below held that the land was liable, and that the corporation might distrain, *Morrison*, J., dissenting.

*Crombie*, for the plaintiff in error, the plaintiff also in the court below (*a*). All land, the statute declares, shall be liable to taxation: Consol. Stat. U. C., ch. 55, sec. 9. Before any individual therefore can be liable for taxes on land, the land itself must be liable to sale; but here the corporation would be selling their own property. The clause of the statute in question—sec. 9, sub-sec. 7—exempts "The property belonging to any county, city, town, township, or village, whether occupied for the purpose thereof or unoccupied." It is argued for defendants that if the section had stopped at the word "village," this property clearly would have been exempt, but that the subsequent words restrict such exemption to the two kinds of property specified. These words do not, however,

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(*a*) Argued 27th August, 1868, before Draper, C. J., of Appeal, *VanKoughnet*, C., *Richards*, C. J., *Spragge*, V. C., *Morrison*, J., *Adam Wilson*, J., *Mowat*, V. C.

restrict, but amplify or illustrate the previous part of the section, or certainly do not limit it. Many instances might be put of sentences framed in the same manner, where the word "whether," following words intended to be general, is clearly not intended to be restrictive. In the first epistle to the Corinthians, ch. xii. v. 13., it is said, "For by one spirit are we all baptized unto one body, whether we be Jews or Gentiles, whether we be bond or free," &c. In the same epistle, ch. iii. v. 22-22, "All things are your's; whether Paul or Apollos, or Cephas, or life, or death, or things present, or things to come; all are your's." In the epistle to the Ephesians, ch. vi. v. 8, "Knowing that whatsoever good thing any man doeth, the same shall he receive of the Lord, whether he be bond or free"—all these are illustrations.

If the Legislature had intended to assess the occupant in respect of the land, without the land itself being made liable, it would have been specially provided for, as in the case of lands vested in her Majesty: sec. 9, sub-sec. 2. The provisions and machinery of the act are inconsistent with the idea of subjecting such land to taxation. Under sec. 22, it should be assessed against both the owner and occupant, and sec. 24, provides, that in such case the taxes may be recovered from either. This cannot apply where the owner is the party to receive the taxes and the body by whom their payment is to be enforced. Sec. 26 provides, that any occupant may deduct from his rent any taxes paid by him if they could have been recovered from the owner. Suppose the city should rent without taking any covenant to pay taxes, they would have then to impose, collect, and repay them: a useless form, which could never have been intended. Moreover, the corporation here had no power to lease. Sec. 243, sub-sec. 1, of the Municipal Act, Consol. Stat. U. C., ch. 54, enables them to obtain property and dispose of it, which means only to sell; and they have no other power.

*Harrison*, Q. C., for defendant in Error. This property is assessable. In England the occupant of Crown property

for his own benefit has always been held liable in respect of his occupation, and it is just that he should be: *Lord Bute v. Grindall*, 1 T. R. 338; *Mersea Docks v. Cameron*, 11 H. L. Cas. 443; *Regina v. St. Martin's Leicester*, L. R., 2 Q. B. 493. The corporation had power to lease, and the plaintiff, their tenant, is not in a position to dispute it. A corporation may hold land subject to the interference of the Crown: *Becher v. Woods*, 16 C. P. 29, 32; *Municipality of Oxford v. Bailey*, 12 Grant, 276.

As to the meaning of the word "whether," when used as in this clause, no general rule can be laid down. It may be used either to amplify or to restrain previous words, according to the context, and its effect in each case must be determined by the context and the consideration of the whole statute. If what precedes it includes every thing, as here, it cannot amplify; it must restrain therefore, or mean nothing; and many cases may be put in which it would clearly have a restrictive effect—"All judges, whether Chief Justices or Pusine Judges," would not include County Court Judges. "All courts, whether the Common Pleas, Queen's Bench, or Exchequer," would not necessarily include the courts of Oyer and Terminer; it would depend on the whole scope and object of the act. The rule is to give a meaning to all words used in a statute, if possible, and there are obvious reasons why the legislature may have intended to limit the exemption as the defendants contended for.

[It was contended also that the decision of the Court of Revision was final, as determined by the court below, but the argument on this point is omitted, as the judgment proceeds upon the other ground only.]

DRAPER, C. J., OF APPEAL.—The rule prescribed by the statute, Consol. Stat. U. C. ch. 55, in relation to the question raised, is contained in the 9th section: all land and personal property is liable to taxation.

The exception applicable in this case is contained in the 7th sub-section of the 9th section, the property belonging

to any county, city, town, township or village "whether occupied for the purpose thereof or unoccupied."

The word "property" includes both real and personal estate.

A philological discussion has been raised upon the word "whether."

This word is used as a pronoun, and also as a "particle expressing one part of a disjunctive question in opposition to the other" (*Johnson's Dictionary*). The Imperial Dictionary defines it as pronoun or substitute.

As a pronoun, both the authorities explain it to mean, which of two; but the latter, after referring to the example taken from the 21st chapter of St. Matthew's Gospel, v. 31—"whether of them twain did the will of his father—asserts that "in this sense it is obsolete," and adds, as an additional sense, "Which of two alternatives expressed by a sentence or the clause of a sentence, and followed by *or*," and gives this example: "Resolve *whether* you will go or not: *i. e.*, You will go *or* not go; resolve *which*."

Speaking with an attempt at strict accuracy, the word *whether* is not used in this section of the act in either of these senses.

As a pronoun, it is not used to signify which of the two kinds of property—*i. e.*, property occupied for the purpose of the municipality, or property not occupied at all—is to be exempt; and in the former case an actual occupancy is referred to, not a mere possession incident to title. Obviously it was intended to exempt, not one, but both—the property occupied for the purpose, &c., and unoccupied property.

As a "particle or substitute" it is not used to denote one or other of two alternatives contained in the sentence, for there is no selection of one or exclusion of the other intended; both are equally exempted.

This the plaintiff agrees, or indeed insists on. He relies on the word "all" in the beginning of the exemption, and argues that the later words, "whether," &c., do not restrict this general word so as to limit the exemption to land



occupied for the purpose of the corporation or unoccupied. He, in effect, treats these words as redundant, or intended as a mere illustration of the meaning of "all," neither confining nor expressive of its whole meaning. He adverts to and urges on our consideration the previous sub-section 4 of the exempting clause in relation to real estate of universities or other educational institutions, where the exemption is declared to exist only so long as such real estate is actually used and occupied by such institution, but not if otherwise occupied, or unoccupied, arguing that the judgment gives as wide an effect to the language of sub-section 7, now under consideration, as could be given to the more express and particular terms of sub-section 4. A suggestion was certainly thrown out, that land for which a tenant paid rent to the corporation was occupied, "for the purpose thereof," but I did not understand that the plaintiff's counsel placed much reliance on this suggestion, nor do I think it requires an answer; it could not be seriously contended that this was an occupation for the "purpose"—*i. e.*, the end and object of creating municipal corporations.

Lord Chief Justice Holt is reported to have said: "I think we should be very bold men, when we are entrusted with the administration of the law and the interpretation of acts of parliament, to reject any words that are sensible in an act." I shall not endeavour to gain a reputation for courage by treating as nugatory the last words of this section.

I should be sorry to infringe upon the modern rules adopted in construing statutes—namely, to construe them "according to the plain and popular meaning of the words," and not to adopt a construction unwarranted by such words, in order to give effect to what I might suppose to be the intention of the legislature; but I should certainly not be deterred by philological colwebs from an exposition of a statute which, in my judgment, is in accordance with the intent to be deduced from a comparison and consideration of its whole language.

I cannot read this 7th sub-section by itself without a

conviction that, however easy it would have been to have used a clearer form of expression, the sole object of the latter part was to explain and limit the general expression "the property belonging to any county," &c., and to give to the whole sub-section the meaning it would certainly bear if "and" were substituted for "whether."

When the principal member of section nine is referred to in connection with the seventh sub-section, this opinion is strengthened. The legislature may reasonably be assumed to have known that municipal corporations in this Province had, or might hereafter have, property neither occupied for the purpose thereof nor unoccupied—for example, buildings at one time both necessary and adequate for their convenience, but which under changed circumstances were no longer wanted, and which it might not be desirable to sell. Such buildings if leased would most probably not be occupied for any corporate purpose, and still would not be unoccupied,

It would make sub-section seven repugnant to the expressed object of the section of which it forms part so to construe it, and thereby to exempt property so circumstanced from liability to taxation, and yet this repugnancy will arise, and arise from what I think a perversion of the latter part of the sub-section, if the plaintiff's contention should prevail. It would in my humble judgment afford a very strong illustration of the maxim, *Qui hæret in literâ hæret in cortice*.

I think the appeal should be dismissed with costs.

VANKOUGHNET, C.—Setting aside any question as to exemption, it seems to me that the defendants still could not levy by distress. When a corporation leases their property, they are the parties to collect both rent and taxes, and when they lease for a sum certain they can take no more; they cannot under the contract superadd taxes. The stipulation that the party shall pay taxes gives, I think, only an action on the covenant, and, the mistake they have made here is in distraining. It seems to me, therefore, that the judgment below should be reversed.

RICHARDS, C. J., ADAM WILSON, J., and MOWAT, V. C., concurred with DRAPER, C. J. of Appeal.

SPRAGGE, V. C., concurred with the Chancellor.

MORRISON, J., adhered to the judgment delivered by him in the court below.

*Appeal dismissed.*

### HAMMOND V. MCLAY.

*Registrar—Tenure of office—9 Vic. ch. 34, 29 Vic. ch. 24.*

Plaintiff in 1859 was appointed registrar, under 9 Vic. ch. 34, which authorized the Governor in general terms to appoint, saying nothing as to tenure, but providing for removal in certain events, to be proved in a specified manner. His commission expressed the appointment to be during pleasure, and in 1864 he was removed and defendant appointed, the admitted cause of such removal being plaintiff's alleged misconduct as returning officer at an election.

The Court of Queen's Bench held that the plaintiff could be removed only for the reasons and in the manner pointed out by the statute: that the words "during pleasure" in his commission could not deprive him of his statutory rights; and that the 29 V. ch. 24, by which every registrar then in office was continued therein, would not confirm defendant's appointment if illegal.

*Held*, reversing such judgment, *Draper*, C. J., and *Morrison*, J., dissenting,—1. That the office being one to which at common law the appointment might be during pleasure, and the statute not providing expressly for the tenure, the plaintiff's appointment during pleasure and his removal were valid. 2. That if the office was one of freehold, then the grant of it during pleasure was void, and the plaintiff was never appointed.

*Adam Wilson*, J., concurred with the court below in holding under 9 Vic. ch. 34, that the plaintiff's appointment was valid and his removal ineffectual; but held, that by 29 Vic. ch. 24, the defendant, then filling the office *de facto*, was confirmed in his appointment.

APPEAL from the judgment in this case, discharging a rule *nisi* to enter a verdict for defendant.

The facts of the case fully appear in the report of that decision (26 U. C. R. 434), and are substantially repeated above in the head-note.

*S. Richards, Q. C.*, for the appellant (*a*). A person may have what may be called a fee simple in an office; that is, certain offices descend; or they may be for life or years: *Bac. Ab. Offices H.*; *Chy. Prerog.* 75; *Cru. Dig.* vol. 3; *Offices*, secs. 23, 40. An appointment under the great seal is in effect an appointment by the Crown: *Hallam. Const. Hist.* 573. The Governor as such never uses the great seal; it is only when the Crown speaks. The plaintiff was appointed under 9 Vic. ch. 34, sec. 3, and he was removed under Consol. Stat. U. C. ch. 89, sec. 10. That section declares that the Governor shall fill up any vacancy occurring by death, resignation, removal, or forfeiture of office, and the removal there contemplated is a removal by the Crown declaring its will and pleasure. The same provision is made in the County Attorneys' Act, Consol. Stat. U. C. ch. 37, sec. 2, and the same kind of removal is there intended. Section 66 specifies certain acts or omissions, which shall be causes of removal when proved in a particular way, and it is argued from this that except under this section there can be no removal; but that clause was introduced only from abundant caution, and does not interfere with the general power. In sec. 11 of Consol. Stat. C. ch. 12, the general act relating to public officers, there is a provision in effect that the Governor may remove, if the officer neglects to give security, and it might as well be argued that this excludes all other grounds of removal. By the Interpretation Act, Consol. Stat. C. ch. 5, sec. 6, sub-sec. 22, the power of appointment is made in all cases to include the power of removal; and when the statutes were consolidated that act was made applicable to all as a rule of construction. It applies here, therefore, unless something can be found in the particular statute to exclude it. The 66th section has not that effect; it is only a further enabling clause. It does not say that

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(*a*) Argued on the 27th and 28th August, 1868, before Draper, C. J., Richards, C. J., VanKoughnet, C., Spragge, V. C., Morrison, J., Adam Wilson, J., Mowat, V. C.



the Governor shall have the power of removal in no other case than those specified, in which case the Interpretation Act would have been inapplicable. The evident intention of the legislature was to place officers generally in the power of those who were responsible for their appointment, and this object should not be frustrated except by clear words: *Ex parte Sandys*, 4 B. & D. 863; *Smyth v. Latham*, 9 Bing. 692; *Hill v. The Queen*, 8 Moo. P. C. C. 138; *Ex parte Robertson*, 11 Moo. P. C. C. 288.

But the appellant contends that the plaintiff, the respondent, never was duly appointed, and if so, he of course cannot recover the fees of an office which he never legally held. The judgment below establishes that this office is one of freehold. The appointment, therefore, can be made only to hold by that tenure, and the appointment during pleasure is void. If the commission had appointed simply to the office, naming no tenure, it would have been different, it would then have been for the time fixed by the statute; but here the commission shews that it was never intended to appoint for life, and he therefore never was so appointed: *McMahon v. Lennard*, 6 H. L. Cas. 970, 980, 981; *The Wensleydale Peerage*, 5 H. L. Cas. 958.

If the construction of the statute be doubtful, the appellant should succeed; for under the present judgment it is very questionable whether all registries made by the defendant are not avoided, and the public inconvenience would be extreme.

*Harrison*, Q. C., for the respondent. The last argument adduced has no weight. If a mere usurper assumes an office, his acts in it are void, but if he comes in under color of an appointment, as in this case, what he does during his tenure is valid: *Parker v. Kett*, 1 Salk. 96; *Rex v. Corporation of Shrewsbury*, Cas. Temp. Hardw. 150; *O'Brien v. Knivan*, Cro. Jac. 554; *Margate Pier Co. v. Hannam*, 3 B. & Al. 266; *Rex v. Slythe*, 6 B. & C. 240. An act of parliament moreover would at once be passed to remove this difficulty, as was done in a similar case: 10 Geo. IV., ch. 8.

This is not a Crown appointment in the sense contended for on the other side; it is the Governor who appoints. Under 35 Geo. III., ch. 5, there was no power of removal in the Executive, but it was conferred by 9 Vic. ch. 34, secs. 19, 20. The provision in Consol. Stat. U. C., ch. 84, sec. 66, for removal in certain specified cases, to be proved in the manner pointed out, shews plainly on what grounds the legislature intended to authorize it, and excludes any other ground or any other evidence; such a provision would have been useless and unmeaning if the general unlimited power of removal existed as well. The maxim "*Expressio unius exclusio est alterius*" is particularly applicable to acts of parliament, and clearly applies here: *Cates v. Knight*, 3 T. R. 142; *Newton v. Holford*, 6 Q. B. 926; *Hamilton v. Lyons*, 5 O. S. 503.

As to the argument, now pressed for the first time, that the plaintiff never was duly appointed: the patent is expressed to be in accordance with the statute, and it is admitted for the appellant that if there had been no *habendum* the tenure would have been for life. But the *habendum* cannot control the grant, for the executive have nothing to do with the tenure. Their power is only to nominate; when that has been done the power is exhausted, and what follows, which is inconsistent with the statute, is void. The plaintiff is in by nomination, and his tenure is established by the act of parliament: *Rex v. Bishop of London*, 1 Shower, 499; *Regina v. Governors of Darlington School*, 6 Q. B. 682; *Weir v. Mathieson*, 3 E. & A. 123; *Hill v. The Queen*, 8 Moore P.C. 138; *Earl of Rosslyn v. Aytown*, 11 C. & F. 742; *Jones and Clerk, Hardres*, 46.

March 13th, 1869, SPRAGGE, V. C., and the following judgment prepared by,

RICHARDS, C. J.—By provincial statute of Upper Canada 35 Geo. III., ch. 5, passed in 1795, it was provided that there should be established in each and every county in the province, wherein it might be deemed "for the present" necessary, an office for the registering of memorials of all

deeds and instruments by which lands within the same might be transferred or disposed of; and it should and might be lawful for the Governor, Lieutenant Governor, or person administering the government of the province for the time being, to name the place where such registry office should be kept, and to nominate and appoint a person of sufficient integrity and ability to each and every office that shall or may "for the present" be established, and as often as occasion may require within the province, *under the conditions thereafter mentioned*, who shall faithfully cause to be registered, &c.

Section 3 enacted that when and as often as the said office should become vacant by *the death, forfeiture* or surrender of any such registrar, the justices of the peace of such counties, at the general quarter sessions of the peace after such vacancy should happen, should in open court draw up a memorial of such vacancy, and transmit the same without delay to the Governor, &c., for the time being, praying that a person of sufficient integrity might be appointed to the said office, and the said Governor, &c., should, *within one month* after the reception of the memorial, appoint a person of sufficient integrity and ability to the said office.

Under section 6, amongst other things, the registrar was required to enter into a bond to the Crown in the penalty of £1000, conditioned for the faithful performance of his duty under this act.

By section 7, when any registrar shall *die or surrender his office*, and if within a year from his death or surrender of office no misbehaviour appears to have been committed by such registrar in the execution of his office, then at the end of the year the recognizance entered into by him shall become void.

By section 10, if any registrar or his deputy shall neglect to perform his duty in the execution of his office according to the act, *or commit or suffer* to be committed any undue or fraudulent practice in the execution of his said office, and be thereof lawfully convicted, then such registrar *shall forfeit his said office*, and pay treble damages with full costs of suit to every person that shall be injured thereby.

The 16th section enacted that no member of the House of Assembly should hold directly or indirectly the office of registrar.

This was the state of the law at the time the proceeding in relation to the mandamus against David McGregor Rogers, referred to in the judgment of the Chief Justice in the court below (26 U. C. R. 440) was taken. At that time the Governor, or person administering the government for the time being, made the appointment "*under the conditions thereafter*" (in the statute) "*mentioned,*" and when a vacancy occurred in the office *by the death, forfeiture or surrender of any such registrar*, the Governor, &c., for the time being, after a memorial from the magistrates in quarter sessions to that effect, "shall, within a month after the said memorial shall be received, appoint a person of sufficient integrity and ability to the said office."

The decision of the Court of Queen's Bench in Rogers's case may be sustained without our necessarily being required to decide in favor of the plaintiff in this suit; for there the appointment was made by the Governor, and the statute does not in words speak of a vacancy occasioned by removal from office, whilst the statute under which the plaintiff was appointed to office (sec. 10, Consol. Stat. U. C. ch. 89) enacts that "as occasion requires, the Governor shall from time to time, *by commission under the great seal of the province*, appoint a fit person to the office of registrar, and shall in like manner fill up any vacancy occurring by the death, resignation, *removal* or forfeiture of office by any registrar." Here the word *removal* is introduced, clearly indicating a mode of creating a vacancy not expressly referred to in the former act, which only names death, forfeiture or surrender, which may be considered to mean the same as resignation in the consolidated act, though technically a surrender of an office would seem in legal language to imply something different from a mere resignation of it.

Besides, the statute of George III. speaks of the Governor for the time being making the appointment of registrar under the conditions thereafter mentioned, and then,



in reference to the new appointment of a registrar, it is, to be made when the office is declared to be vacant by the justices of the peace, by the death, forfeiture, or surrender of any registrar.

On referring to the imperial statute, 2 & 3 Anne, ch. 4, establishing a registry office for the west riding of York, and 8 Geo. II., ch. 6, establishing a similar office for the north riding, it is obvious that the persons who prepared our first registry act must have had one or both of these statutes of the Imperial Parliament before them.

The 5th section of 2 & 3 Anne provides, that when the office shall become vacant by the death, forfeiture, or surrender of such registrar, the justices of the peace for the riding are to declare the vacancy, and fix the time for holding the election to supply the vacancy, *within a month* after the sessions, and not before three weeks. Section 3 of our act of 35 Geo. III., seems to have been prepared from this.

Section 10 speaks of the recognizance to be entered into by the registrar when sworn into office, its approval by the justices, and transmission to be filed with an officer of the Court of Exchequer. Section 6 of our statute, 35 Geo. III., makes similar provisions, and the recognizance is to be transmitted to the Court of Queen's Bench, to remain amongst the records of the court.

The imperial statute provides, (sec. 2), that if no misbehaviour appears within three years after the surrender of the office, or death of registrar, the recognizance is to be void. Section 7 of our statute limits the time to one year after the death or surrender of office by the registrar. Section 14 is in the very words of the tenth section of the Upper Canada statute.

The act of George II. as to the north riding of York (8 Geo. II., ch. 6) has many provisions in common with the statute of Anne, relating to the west riding. Section 6 is the same as section 5 of 2 & 3 Anne. Section 28 refers to the recognizance to be given by the registrar as to performance of his duties. Section 29 imposes a penalty for

neglect of duty, &c., using the same words as our own statute of Geo. III. and the similar section of 3 & 4 Anne.

Under both these English statutes the registrars were to be chosen by ballot, at a time to be named by the magistrates, by freeholders holding estates of the annual value of £100. Under both statutes the person elected was "*to continue in the said office for so long time as he shall well demean himself therein.*"

The Middlesex Registry Act, 7 Anne, ch. 20, made certain officers of the courts registrars, and they were authorized to appoint deputies to execute the office, who were to be presented to the Lord Chancellor, Chief Justice of the King's Bench, Chief Justice of the Common Pleas, and Chief Baron of the Exchequer for approval, any three of whom might approve; and such deputy might be displaced and removed by writing under the hand and seal of three of the persons above mentioned. The only remedy against the registrar for fraudulent practices under that act seems to be under the recognizance that each registrar was required to enter into.

There is no doubt, I apprehend, as a matter of fact; that the person who prepared and adopted our statute from the York English registry acts contemplated a different tenure of office from that under which the registrars held under those acts, and the appointments which immediately followed the passing of our statute being to hold the office during pleasure, is a strong argument that those who were called upon to make these appointments, probably the very persons under whose directions our act was framed, understood that it authorized an appointment during pleasure.

In giving judgment in *Harcourt v. Fox* (1 Shower 506) Lord Holt said, p. 535, he was more inclined to entertain a certain opinion as to the statute then under discussion, because he knew the temper and inclination of parliament at the time the act was made. He cited the maxim "*Contemporaria expositio legis est optima,*" and added "A contemporary exposition of a law is always the best, because the temper of the law-makers is then best known."

The first legal exposition of the statute, as far as we have any trace of it, is in Rogers's case already referred to, but we have no report of that case or the grounds on which it was decided, and this decision made in 1808, thirteen years after the statute was passed, is not such a contemporaneous decision on the statute as that to which Lord Holt refers, for the statute he was discussing was passed in the session of parliament held in 1 & 2 William & Mary, and the decision he was making was in the fifth year of the reign of the same Sovereigns. As I have already remarked, the decision in Rogers's case does not necessarily govern this.

Under section 77 of Consol. Stat. U. C. ch. 89, the committal of fraudulent practices, and a conviction therefor, created forfeiture of the office, in the same way as in section 10 of the act of Geo. III. But under section 66 of the consolidated statute, if the registrar did not keep his office in the place appointed, or neglected under certain circumstances to remove to the office provided for him at the time fixed by the Governor, or if he ceased to reside within the limits of the county for which he was registrar, or became by sickness or otherwise wholly incapable of discharging the duties, and the grand jury at the quarter sessions made a presentment of such facts respectively, which presentment was to be forwarded to the Governor, the Governor might in his discretion remove such registrar.

The language used in these sections shews that the legislature contemplated that appointments of registrars under that statute might be for life, in which event the sections allowing a removal for forfeiture or other causes mentioned in the 66th section, would be necessary. The statute does not expressly declare the tenure of office, and it seems to me that the Crown is not necessarily bound to bestow such office for life or good behaviour, on the general principle that the Crown is not bound by statutes which bind other parties, unless expressly named therein. The prerogative rights of the Sovereign in the matter are not taken away by express terms.

By the statute under which the plaintiff was appointed,

the Governor was authorized to make the appointment under the great seal of the province, and such appointments always are and were in the name of the Sovereign, so that authorizing such an appointment to be made by the Governor, under the great seal, would in effect be the same as if the appointment was by the statute to be made by her Majesty, her heirs or successors.

Lord Holt, in his judgment in *Owen v. Saunders*, 1 Ld. Raym. 165), says: "Where the King, his heirs or successors, may nominate, this raises an inheritance in them, and they may well derive an estate of inheritance out of them; but that does not hold place in our case, and therefore the cases differ."

As the grant of this office was in the name of the Sovereign, and under the great seal, it must be construed in the same way as other grants made by the Crown, and if it cannot pass what the Crown intended to pass, then it seems to me the result must be, the appointment of the plaintiff was null. "The King's grants are construed very differently from those of private persons, for being matter of record, they ought to contain the greatest certainty, and as they chiefly proceed from the bounty of the Sovereign, they should be construed most favorably for the Crown and against the grantee, contrary to the manner in which all other assurances are construed: (Plow. 243). Thus, if the King grants lands to a man and his heirs male, this is void, for there can be no such tenure; but in the case of a subject, such a grant would have passed an estate in fee: (1 Coke, 43 b.; 1 Inst. 27 a. i. 547.) A subject's grant shall be construed to include everything necessary to the enjoyment of the thing granted, without express words (1 Inst. 56 a. i. 641); but the King's grant shall not enure to any other intent than that which is precisely expressed in the grant." (1 Rep. 41 a; in note 2.)

"So if the King be tenant for life, and the King grants the land to another and his heirs, that grant is void, for the King taketh upon him to grant a greater estate than he lawfully can grant. And because his grant cannot take



effect according to his intent expressed in his grant, for that cause his grant is void, and shall not be construed to pass other estate than he intended to grant; as to pass an estate for life when the King intended and purposed to grant an estate of inheritance:" *Alton Wood's case* (1 Rep. 44 a.); see also *Knight's case* (5 Rep. 54 b).

I assume this is an office of the character which at common law could have been granted for life, or for years, or at will. Reference is made to many of the cases in *Cruise's Digest*, Vol. III. Title XIV. offices, secs. 33 to 40 inclusive. In sec. 36, Lord Hale is said to have been of opinion, in 2 Shower R. 171, that an office of trust might be granted for years. Sec. 37. In *Reynel's case* (9 Rep. 97 a), the judges said that the office of marshal of the Marshalsea had always been granted for life or at will; and there is a precedent, in Dyer 176 a., of grant by the King of the office of Chirographer of the Common Pleas to hold as long as it should please his Majesty.

In *Veale v. Priour* (Hardres 351) Lord Hale says: "Where a greater estate may be granted, there regularly a lease may, unless there be some special reason to the contrary. And if this office may be granted for life, in tail or in fee, it may be granted for years; and it is not universally true that offices cannot be granted for years, for some can and are so granted." *A fortiori*, they may be granted during pleasure, if for years.

In the court below I do not think the question was considered how far the Crown would be bound to make the appointment for life, or for so long as the registrar should well demean himself in the office; but the case was disposed of on the broad ground that the legislature intended that the appointment should be in the nature of a freehold office, from which the incumbent could only be removed in the manner pointed out by the statute.

The proposition contended for on behalf of the plaintiff, I understand, is, that the statute creates the office, prescribes the duties of the office, in effect declares its tenure, and all that the Crown is permitted to do is to appoint the person

to fill the office; that the clause in the commission limiting the enjoyment of it to the pleasure of the Crown is void, and the plaintiff is in under the statute. This undoubtedly is the strong ground on which the plaintiff's claim rests.

The answer in this view is, that the Crown is not bound by the same rules of construction that a private individual is, and if the proposition would be correct as to an individual, it fails when applied to the Crown: that as applicable to an individual, and viewing the right of the Crown to fill the office as a naked power, to be exercised in the same manner as and to the same extent only as an individual, the decided cases are in favor of the defendant, for the appointment, if required by the statute to be *quamdiu se bene gesserit*, as held by the court below, must be void.

*Owen v. Saunders* came before the courts in various forms: on application for a mandamus to the Court of King's Bench—*The King and Queen v. Owen*, (4 Mod. 293); on a writ of error from the Common Pleas in an assize of novel disseisin: *Saunders v. Owen*, (5 Mod. 387); again on the writ of error in the Court of King's Bench: *Saunders v. Owen*, (12 Mod. 199). In some one of these forms it is reported.

The facts of that case were established by a special verdict. Under the statute of 1 W. & M., ch. 21, it was provided that the *custos rotulorum* should appoint one sufficient person residing within the county to be clerk of the peace, "for so long time as the said clerk shall demean himself in the said office." Then the Earl of Winchelsea was *custos rotulorum* of the county of Kent. The office of the clerk of the peace was vacant. The verdict found "that the twelfth of July, the Earl, by writing under hand and seal, appointed the said Philip Owen to be clerk of the peace *durante bene placito* of the said Earl: that after, the 15th of July, at the General Quarter Sessions the said writing was shewn to the justices of the peace: that a question arose among them of the validity of the grant, and they refused to admit him; afterwards at the same sessions held by adjournment at Canterbury, by the Earl of Winchelsea's

orders the said writing was read in court, and then at the same sessions, *absque ulla relatione ad scriptum præd. habita*, the said Earl spoke *hæc verba sequentia in his Anglicanis verbis*: 'I do nominate and appoint the said P. Owen to be clerk of the peace according to the act of Parliament,' and afterwards Owen was admitted. Then the Earl died, and the Earl of Romney was made *custos rotulorum*, who granted the said office to Saunders, *quamdiu se bene gesserit, &c.*," who entered and disseized Owen of the office: (12 Mod. 200).

The Court of Common Pleas held, that even if the appointment of Owen during the pleasure of the Earl of Winchelsea was void, the verbal appointment conferred the office upon him, under the statute, *quamdiu se bene gesserit*.

The Court of Queen's Bench, in the same matter, when before them on a mandamus, as reported in 4 Mod. 295, decided that no mandamus should go, for by the act of 1 Wm. & Mary, ch. 21, the *custos* was to nominate the clerk of the peace, to execute that office for so long a time as he shall well demean himself, &c., and if he appoint him in any other manner, he is no clerk of the peace; therefore the defendant (Owen) being appointed by the Earl of Winchelsea during pleasure, is not pursuant to the act, for he has not executed the authority given to him by the act; and so the defendant has no title." This was in Trinity Term, 6 Wm. & Mary.

*Owen v. Saunders* is reported in the Common Pleas, in 1 Lord Raym. 158. Judgment appears to have been given in Hilary Term 8 & 9 W. III. (1696). Powell, J., in his judgment referred to the decision of the Court of King's Bench on the mandamus, holding that the Earl of Winchelsea had but a bare authority by the statute of William and Mary to appoint the clerk of the peace *quamdiu se bene gesserit*, and therefore, not having pursued his authority, his appointment was void and not warranted by the act. The case is reported in Comb. 399; 4 Mod. 293; Holt 190. In the judgment of Treby, C. J., and Nevill, J., Treby, C. J., said he would submit to the resolution of the King's

Bench in *Rex v. Owen*, upon the mandamus, that the written appointment was not good, though it seemed to him that 10 Co. 34 was against that resolution, for here the words during pleasure will be void as they were there. He based his judgment on the verbal appointment, and in referring to the argument he said, as to Dyer 150, 2 Anders. 119, they were authorities for his view, yet as that was but a single case he did not rely much on it.

*Harcourt v. Fox*, which will be referred to hereafter, reported in 4 Mod. 167, was argued in the King's Bench, in Hilary Term 4 and 5 Wm. & Mary. The case is also reported in 12 Mod. 42, in Trinity Term, 5 Wm. & Mary, when judgment was given.

The writ of error from the Court of Common Pleas in *Saunders v. Owen*, is referred to in 5 Mod. 387, Hilary Term 9 Wm. III. The case is stated, and the arguments proceed. It is stated as to plaintiff's title, it proceeds on two grounds: *First*, by grant; second, by parol declaration. Then, as to the *first*,—he had no title by the grant; and that is all that seems to be said about that point in the argument. The case is then adjourned, and in 12 Mod. is reported, in Trinity Term 10 Wm. III., when the judgment of the court is given by Chief Justice Holt, holding that a parol appointment of a clerk of the peace by the *custos rotulorum* is good, but reversing the judgment of the Court of Common Pleas, on the ground that the words used by the Earl of Winchelsea were not sufficient to confer the office on Mr. Owen. But that judgment was afterwards reversed in the House of Lords.

*Harcourt v. Fox*, in Trinity Term, 13 May, 1693, 5 Wm. & Mary, is reported in *Shower* at p. 506. The first argument is reported as occurring in Hilary Term, 4 & 5 Wm. & Mary, 8th February, 1692, at p. 426. In giving judgment, at p. 517, referring to the suggestion that the defendant's appointment as clerk of the peace must be void, he having been appointed to hold his office during the time the *custos rotulorum* should hold that office, the defendant demeaning himself well therein, Eyres, Justice, said, "I take it the plaintiff must recover by the strength of his own



title, and not by the weakness of the defendant's title. But withal I am of opinion, that notwithstanding that limitation in the defendant's grant, if the plaintiff was not still clerk of the peace, the defendant would be clerk of the peace within this act of parliament; for I take it the *custos rotulorum* has only a power to nominate, and when once the clerk is in his estate in the office, he is settled by the statute, and not by the limitation in the grant; and it is like the case in *Dyer* 153, b. \* \* \* \* And so there it is plain, though it be an ill limitation and nomination, that would not avoid the defendant's title to the office, he being in by the statute, and the *custos* having nothing but the nomination thereof, that objection, I think, has nothing in it." The other judges, Gregory, J., Dolben, J., and Lord Holt, C. J., gave their judgment on the ground that Harcourt's appointment being in accordance with the statute, to hold so long as he should well behave himself, was an appointment for life, and therefore the fees of the office were his.

Notwithstanding the observations of Eyres, J., above quoted, he afterwards apparently concurred in the judgment of the mandamus case in *The Queen v. Owen*, argued in T. T., 6 Wm. & Mary, in which judgment was given in Hilary Term then following, when it was decided no mandamus should go, because by the act 1 Wm. & Mary, ch. 21, the *custos* is to nominate a clerk of the peace, to execute that office so long as he shall well demean himself, and if he appoint him in any other manner he is no clerk of the peace; therefore the defendant being appointed by the Earl of Winchelsea during pleasure, it is not pursuant to the act, for he has not exercised the authority given him by the act, and so the defendant has no title.

The words of the statute 1 Wm. & Mary, ch. 21, are that the *custos rotulorum*, or other person to whom it belongs to nominate the clerk of the peace, shall appoint one able and sufficient person residing within the county to be clerk of the peace "for so long time only as such said clerk of the peace shall well demean himself in his said office."

In *McMahon v. Lennard* (6 H. L. Cas. 970), the question was in reference to the appointment of a weigh-master of the market-town of Clones, in Ireland, made by Sir John Lennard. The Chief Justice, on the trial of the cause in charging the jury, referring to the appointment, said the appointment to be valid must be for life, and if that appointment was made during the will and pleasure of Sir Thomas Lennard, or from year to year, the appointment would be void.

See also the *Wensleydale Peerage Case*, 5 H. L. Cas. 958

On the whole, I have come to the conclusion that the office in question is of that character to which at common law the appointment might be made to hold during the pleasure of the Crown; and the statute in itself not expressly limiting the Crown as to the appointment which should be made, under the general principle applicable to the Crown, the appointment might be made either *quamdiu se bene gesserit*, or during the pleasure of the Crown.

If the legislature, at the time of passing the act under which the plaintiff was appointed, entertained that view, the provisions contained in the statute relative to forfeiture, and to the power of removal by the Crown, could well apply when the office was granted for life. But when only granted during pleasure, of course the provisions in the 66th section giving power to the Crown to remove him would be unnecessary. The forfeiture declared by the 77th section would be proper in either view that may be taken of the law.

In this view, I think the writ of *supersedeas* under the great seal of the province under date of the 26th July, 1864, removed the plaintiff from office; and being so removed I think the commission appointing defendant to the office, bearing date the same day, was authorized by the 10th section of Consol. Stat. U. C. ch. 89, which declares the Governor shall, from time to time, by commission under the great seal of the province, appoint a fit person to the office of registrar, and shall in like manner fill up any vacancy occurring by the death, resignation, *removal*, or forfeiture of office by any registrar. Here there was a vacancy occasioned

by removal, which was filled up by the defendant's appointment.

If this view be wrong, then I think the grant of the office to the plaintiff must be inoperative and void. In the judgment of the Court of Common Pleas in *Owen v. Saunders* (1 Ld. Raym. 161), reference is made to *Auditor Curle's* case (11 Co. 4 *a*), in which it was shewn the appointment made under the statute of H. VIII. was executed *by a grant*. The court said, p. 165: "Where the King, his heirs or successors, may nominate, this raises an inheritance in them, and they may well derive an estate of inheritance out of them."

If then we construe the grant of the office to the plaintiff as we would any other grant made by the Crown, unless the plaintiff held the office during the pleasure of the Crown, the grant was void. The Crown never intended to grant the plaintiff an estate for life, and the authorities to which I have referred shew that when the Crown granted a larger estate than it had, it would not even pass the lesser estate which was in the Crown, and for the reason that, although the grant of a private person would be construed to vest in the grantee all the estate which the grantor had in the thing granted, yet it is not so with the Crown, for such was not the intent of the Crown.

If this is viewed as a naked power of appointment under the statute, to be exercised by the Crown as by a private individual, the decision of the Court of Queen's Bench on the application for a mandamus in *The Queen v. Owen* is express authority that the appointing of the plaintiff to hold the office during the pleasure of the Crown (if the office, as decided by the court below, is one in which the appointment is to hold *quamdiu se bene gesserit*) is void, because the power has not been followed. This decision on the express point by the full court, after the opinion expressed by Eyres, J., in the same court before that, in *Harcourt v. Fox*, already referred to, decides directly contrary to the views expressed on the question of the proper exercise of the power by Mr. Justice Eyres.

In the Court of Common Pleas, in *Owen v. Saunders*, as reported in Lord Raymond, two of the judges expressly submitted to the judgment of the Court of Queen's Bench on the mandamus as to the written appointment being void, though expressing the opinion that 10 Coke 34 was against it. Powell, J., said he concurred with the judgment of the Court of Queen's Bench. In the decision in the Court of Queen's Bench in the case in Error, it seemed to be considered as settled that the written appointment was bad; and after argument and discussion, it was held that the verbal appointment was bad also. On this latter point, however, the House of Lords sustained the judgment of the Common Pleas, as I understand it.

DRAPER, C. J. OF APPEAL.—My brother Hagarty and I have endeavoured to come to the conclusion just now expressed, and although we have been unable to satisfy ourselves that we were wrong in the decision appealed from, we are glad that the majority of this court take a different view.

VANKOUGHNET, C. (a), and SPRAGGE, V. C., concurred with Richards, C. J.

MORRISON, J., adhered to his opinion in the court below.

ADAM WILSON, J.—The statute does not expressly declare what the tenure of office of registrars shall be. The Governor makes the appointment, and he has power to fill any vacancy occurring by death, resignation, removal, or forfeiture.

If the registrar does not keep his office at the place named in his commission or by proclamation, or if he has not a fire-proof office and vaults, and neglects to remove to the office provided for him by the County Council or otherwise, at the time fixed by the Governor, or if he ceases to reside in his county, or becomes by sickness or otherwise wholly incapable of discharging the duties of his office, and if the

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(a) The Chancellor referred to *Travell v. Carteret*, 3 Lev. 135.



grand jury at any quarter sessions present such facts, the Governor may, in his discretion, remove the registrar; and if he neglects to perform his duty, or commits or suffers to be committed any undue or fraudulent practice in the execution of his duty, and be legally convicted thereof, he shall forfeit his office.

This is not an office which concerns the administration of justice, nor is it an ancient office, to be governed by the rules of the common law: *Hill v. The Queen* (8 Moo. P. C. 138).

The office is not therefore one necessarily of freehold.

In *Regina v. Guardians of St. Martin's* (17 Q. B. 149)—the office of clerk to the guardians being for life, and during sanity, or until resignation, or removal by the commissioners—Lord Campbell, C. J., said “They may remove him at any time; but the appointment is equivalent to an appointment *quamdiu se bene gesserit*,” p. 155. “The removal must be on some grounds,” p. 160. Coleridge, J., said, “The clerk is removable by the commissioners; but that must be on cause shewn.”

In *Ex parte Ramshay* (18 Q. B. 173–179), Lord Campbell, C. J., said, the Chancellor of the Duchy of Lancashire had power to remove the judge “for inability or misbehaviour:” that his decision was not conclusive, his authority to dismiss being subject to the control of the court, which could enquire into the cause and manner of an amotion. Mr. Ramshay might shew he was removed without notice of any charges against him, or without an opportunity of being heard in his defence, or that no evidence was adduced to support the charges, or that the complaints against him were not for inability or misbehaviour, within the meaning of the statute. Where the party complained against has had a fair opportunity of being heard, where the charges, if true, amount to inability or misbehaviour, and where evidence has been given in support of them, “we cannot enquire into the amount of evidence, or the balance of evidence, the Chancellor, acting within his jurisdiction, being the constituted judge upon the subject. \* \* The Chancellor’s sentence of removal should be final and con-

clusive." See *The King v. The Archbishop of Canterbury* (15 East, 117-143); *The King v. The Bishop of Gloucester* (2 B. & Ad. 158).

The provisions of the statute as to removal from and forfeiture of office are not consistent with an appointment "during pleasure," only.

I think, therefore, the tenure of the office must have been intended to have been of a more permanent nature than at will.

I do not come to this conclusion by the application of any common law rule or principle, for in a new office of this kind the holding must be determined by the statute enacting it, and not by such rules as are applicable to ancient offices, or to those which concern the administration of justice: *Smyth v. Latham* (9 Bing. 692); *Hill v. The Queen* (8 Moore P. C. 138); *Regina v. Governors of Darlington School* (6 Q. B. 682).

The only title which the Crown could lawfully confer in this office, by a just construction of the statute, was during good behaviour or for life, although it is true an office at will is as capable of being determined by forfeiture as by amotion: *Regina v. Kempe* (1 Ld. Raym. 52); *Regina v. Watts* (1 Salk. 357).

What, then, is the effect of the appointment of the plaintiff during pleasure? Is it wholly void as contrary to the statute, or because the Crown has been deceived? or is it valid, and by construction and operation of law is it to be considered as an appointment during good behaviour?

If the King grant to one the office of clerk of the County Court, with all fees, &c., for life, this is void against the sheriff of the county when he is made sheriff, because the County Court, and the entering of all proceedings in it, are inseparably incident to the office of sheriff: *Mitton's case* (4 Co. 32 b); *Snow v. Firebrass* (2 Salk. 439).

In *Harcourt v. Fox* (4 Mod. 167, *Shower* 426), the *custos rotulorum* had the appointment of the clerk of the peace "for so long time as he should demean himself well." That was held to be for life, and therefore a new *custos* could

not appoint a new clerk of the peace while the office was full by the appointment of the predecessor of the *custos*.

In *Rex et Regina v. Owen* (4 Mod. 293, 1 Ld. Raym. 158), it was held that the appointment of a clerk of the peace by the *custos* to hold his office during pleasure, was a valid appointment for life, because the statute made it an office for life; and that the words during pleasure should be held void.

If there be no difference between the grant of the Sovereign, and the grant of a subject who has power by patent or by statute to make an appointment to office, then it is clear the grant to the plaintiff to hold during pleasure must be read as a grant for life, notwithstanding the limitation to hold at will.

The reason of this, as applied to the grant of a subject, is that the power he has to execute is on making the selection of a competent person to fill the office, and when he has done that, the grantee is in his office by virtue of the statute or other authority which conferred the power on the grantor of the office or donee of the power, and he has no authority to make any limitation of estate, or any reservation contrary to the terms of the power.

The general rule which applies to Crown grants is, that if they cannot take effect as the Sovereign intended, they are void; the Crown is supposed to have been deceived in making the grant: 2 *Bl. Com.* 348.

The grant of an office conferring a greater estate than the Crown has to grant is void: 9 *Co.* 97*a*. If the thing is in the King in another manner than he supposes, the grant is void: *The King v. Clarke* (Freem. 172; 2 *Bl. Com.* 348). And nothing will pass by a Crown grant but by clear and express words: *Broom's Legal Maxims*, 260; *Rex v. Mayor of London* (1 *Cr. M. & R.* 12-15).

These decisions lead to the conclusion that the grant to the plaintiff during pleasure is void, as being contrary to the effect of the statute.

But I am not satisfied they can be applied to their full

extent when the power is exercised in pursuance of a statute, nor am I satisfied there is in such a case any distinction between the grant of the Crown and that of a subject to whom the power of appointment may have been given.

I will not say that in no case could the grant of the Crown be avoided when it is made by virtue of an Act of Parliament, for a statute might be so obscurely worded that the Crown might not know what its rights really were, and so it might be deceived in granting that which it had not the right to give, or by granting it differently than it had the power to do.

But when a statute expressly declares that the appointment shall be during good behaviour, as in the case of the judges, I think that an appointment during pleasure would not be wholly void, but would be void only so far as the defective limitation of office was concerned, and that the appointee would hold by operation of law during good behaviour.

Under the statute in question here, no term or tenure of office is mentioned, but the general construction of it is not so difficult, in my opinion, as to warrant the court in saying that the Crown when it made the grant was in fact deceived, although it may take effect in a manner different from what her Majesty intended.

The legislature, the donors of the power, intended the grant to operate as I think it should be interpreted, and so it may be said her Majesty has not been deceived, because she is merely executing a power, and not conferring an estate or title.

If a person make a lease for twenty-one years, and patron or ordinary confirm it for seven years, it is a good confirmation for twenty-one years, for the same is not divisible: *Bac. Abr., Leases, G. 2.*

My conclusion would be in favor of the judgment of the court below, if I had to decide without regard to the 29 Vic. ch. 24. The 9th section enacts that "Every registrar in office when this act takes effect is hereby



continued therein." So that the defendant, who filled the office *de facto* under a patent from the Crown after the plaintiff, and who may be presumed to be in office still, as the determination of his tenure will not be presumed, is by this legislative declaration *continued* in the office of registrar.

How then can it be said that the plaintiff should recover the fees of this office from the defendant? His assumption of the office has now been legalized. He is therefore the legal occupant of it, and not the plaintiff.

The case of *The Queen v. The Inhabitants of Denton* (18 Q. B. 761), and the other cases there referred to, shew that if a statute, after the commencement of proceedings, and under which the proceedings are taken, be repealed, these proceedings are determined. The same principle applies here, for the plaintiff's title has been determined, and the defendant's title has been confirmed and established.

If this be the correct view to be taken, the judgment even now must be for the defendant.

*Appeal allowed.*

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## SMITH V. MOFFATT, ET AL.

*Fraudulent conveyance—13 Eliz. ch. 5.*

A sale and conveyance for valuable consideration, paid at the time, of the grantor's interest in certain land to his father-in-law, made in 1857, was impeached as being fraudulent as against creditors, under the 13 Eliz. ch. 5. The learned judge asked the jury whether the deed was a *bonâ fide* transaction, a deed made for a valuable consideration, or whether it was fraudulently made, as a mere scheme or contrivance for the purpose of delaying, hindering, or defrauding creditors, in which latter case he said it would be void; and he refused to add, that if they believed the consideration was paid to cover the property and protect it from creditors, they should find against the deed.

*Held*, affirming the judgment of the Queen's Bench, that the charge was unobjectionable, being substantially in accordance with *Wood v. Dixie*, 7 Q. B. 892, which was recognized and followed.

*Spragg*, V.C., dissented, on the ground that the jury should have been told, that although they might find that the conveyance was for value, yet if the intent and purpose of both grantor and grantee was to defraud creditors, the deed would be void; and that this was not the effect of the charge.

APPEAL from the judgment in this case reported in 27 U. C. R. 195, discharging the rule *nisi* for a new trial on the ground of misdirection.

The question to be determined at the trial was the validity of a conveyance executed on the 19th October, 1857, by one Oliver J. VanDolsen to Joseph Smith, his father-in-law, of his interest in certain land. The plaintiff brought ejectment, claiming under the conveyance, as devisee of Joseph Smith. The defendant Moffatt was a purchaser at sheriff's sale of VanDolsen's interest in the land, and contended that the conveyance was void as against creditors under the Statute of Elizabeth. The other defendants were his tenants.

The learned judge at the trial, Morrison, J., left it to the jury to say whether the deed was a *bonâ fide* transaction, a deed made for a valuable consideration, or whether it was fraudulently made, as a mere scheme or contrivance for the purpose of delaying, hindering or defrauding creditors; and if the latter, to find for defendants.

The court below held that this was a direction substantially in accordance with *Wood v. Dixie*, 7 Q. B. 892, and not open to objection.

The defendant Moffatt appealed, on the ground that there was misdirection, in not telling the jury that although Smith might have paid a valuable consideration for the conveyance, yet, notwithstanding, if the deed was made with intent to delay, hinder or defeat creditors, it was void.

The evidence given at the trial, the facts of the case, which were peculiar, and the different conveyances, are fully stated in the report of the decision below, 27 U. C. R. 195.

*Strong*, Q. C., for the appellant (a). *Wood v. Dixie*, 7 Q. B. 892, can be supported, if at all, only on the ground that it was not a sale to a stranger, as here, but a preference. A sale is void, though for good consideration, if made to defeat an execution creditor, but a preference of one creditor to others by conveying to him property for his debt, may not be. By attending to this distinction that case may be reconciled with nearly all the decisions, but otherwise it will be found in conflict with the great weight of authority. The conveyance impeached there was not a conveyance to a stranger; it was a case of preference, and the facts did not call for the language of Lord Denman. In *Gottwalls v. Mulholland*, 15 C. P. 70, almost all the cases are referred to, except *Lynch v. Coppinger* in the Common Pleas in Ireland, 14 W. R. 863, which was substantially a case of preference. *Darvill v. Terry*, 6 H. & N. 807, was also to some extent of the same character. *Luff v. Horner*, 3 F. & F. 480, it must be admitted, is not susceptible of this explanation, and is against the appellant, but it is a *Nisi Prius* case only, and therefore of comparatively of little weight. *Hale v. The Saloon Omnibus Company*, 4 Drewry 492, seems at first sight also opposed, but it may be explained. The question which the Vice Chancellor dealt with was whether the transaction was a cloak or was real; and he says, if it was a real transaction *it was without notice* on the part of the

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(a) Argued on the 8th January, 1869, before Draper, C.J. of Appeal, Richards, C. J., VanKoughnet, C., Hagarty, C. J. C. P., Spragge, V.C., Mowat. V. C., Adam Wilson, J., Gwynne, J.

grantor of any intention to delay creditors, and that was the true ground of the decision. *Hall v. Kisson*, 11 U. C. R. 9, is also opposed to the appellant; and these are the only cases strongly against him.

On the other hand, the cases in favor of the view contended for are numerous. Payment of a full consideration will not avail if the sale was made to defeat a creditor, that intention of course existing in the mind both of the seller and purchaser. Here it was clearly shewn that Smith had notice of VanDolsen's position, and of the object of the sale. *Bott v. Smith*, 21 Beav. 511, is a strong case, in which the deed was set aside, though there was no actual fraud. The Master of the Rolls there said: "All parties were perfectly well aware of this execution for upwards of £200 against the plaintiff, that steps had been taken to enforce it against him, and that the result would have been to have turned him out of possession of the property; and in fact this was the only means by which he could be retained in possession of it. In that state of circumstances it seems to me that the inference is irresistible that this deed was executed with the view of delaying and defeating the creditor. I do not use the expression 'fraudulent,' it is not the proper expression with respect to this case. \* \* \* It is said that when this transaction is set aside the plaintiff will get very little by it. But if I am of opinion that it is void under the statute, I am bound to come to that conclusion. Even if full consideration had been given that is not sufficient, because, as is shewn in *Stileman v. Ashdown*, 2 Atk. 477, the consideration may be given in such a form as to defeat the judgment creditor, and this is a case in which it might defeat the judgment creditor."

In *Holmes v. Penney*, 3 Kay & Johns. 90, which was a case of voluntary settlement, Sir W. P. Wood, V.C., said: "In the case of *Harman v. Richards*, 10 Hare, 81, it was said by Lord Justice Turner, that if a settlement be made for valuable consideration, then the only question for the creditor is, whether it is made *bonâ fide*, for a deed, though made for valuable consideration, may be affected by *mala fides*."



*Cadogan v. Kennett*, Cowp. 434, per Lord Mansfield; *McMaster v. Clare*, 7 Grant, 550; *Bank of Upper Canada v. Thomas*, 9 Grant, 321; *Crawford v. Meldrum*, 3 E. & A. Rep. 101; *Nunn v. Wilsmore*, 8 T. R. 521; *Commercial Bank v. Cooke*, 9 Grant, 524; *Harman v. Richards*, 10 Hare, 81; *Graham v. Chapman*, 12 C. B. 85; *Smith v. Cannan*, 2 E. & B. 35; *Pennell v. Reynolds*, 11 C. B. N. S. 722; *Gotwalls v. Mulholland*, 15 C. P. 62; *S. C.* in Appeal, 2 E. & A. Rep. 199; *French v. French*, 6 DeG. M. & G. 95; *Corlett v. Radcliffe*, 14 Moore P. C. at p. 121; *Pickstock v. Lyster*, 3 M. & S. 371; *Clark v. Morrell*, 21 U. C. R. 596; *Thompson v. Webster*, 4 DeG. & J. 600; *Kerr on Fraud*, 154-5; American Leading Cases, Vol. I. p. 72; *Beals v. Guernsey*, 8 Johns. 446; *Wickham v. Miller*, 12 Johns. 225, will all be found to support strongly the appellant's contention.

In *Sutton v. Bath*, 1 F. & F. 152, Erle, J., directed the jury in substance as the appellant here contends for.

In *Wooderman v. Baldock*, 8 Taunt. 678, Dallas, C. J., said: "It is well known that if a man having been informed that there is a judgment and execution, should, for the purpose of defeating them, purchase the goods of the debtor, such purchase would be void."

Then the class of cases in which marriage is the consideration afford a conclusive argument. There there can be no feigned deed and no want of consideration, and yet it will be set aside if made to hinder and delay creditors: *Campion v. Cotton*, 17 Ves. 263; *Fraser v. Thompson*, 1 Giff. 49; *In re McBurnie*, 1 DeG. M. & G. 441; *Colombine v. Penhall*. 1 Sm. & G. 228; *Commercial Bank v. Cooke*, 9 Grant, 524, are of this class.

The charge should have been, that if the grantor intended by the sale to defeat creditors, and if the purchaser had notice of such intent, the deed was void, notwithstanding a valuable consideration may have passed. There was therefore misdirection, and the judgment refusing a new trial should be reversed.

*Robinson*, Q. C., for the respondent. It is admitted on the other side that this case is governed by *Wood v. Dixie*, 7 Q. B. 892, unless the distinction suggested, between a sale and a preference, can be supported. The questions then are:—1. Whether that case is still law, and 2. Whether the distinction is well founded. *Wood v. Dixie*, 7 Q. B. 892, was decided in 1845. It has never been overruled or even directly impugned, but, on the contrary, has been recognized and followed: *Hall v. Kissock*, 11 U. C. R. 9; *Hale v. Saloon Omnibus Co.*, 4 Drewry 492; *Lynch v. Coppinger*, 14 W. R. 863; *Darvill v. Terry*, 6 H. & N. 807; *Clark v. Morrell*, 21 U. C. R. 600; *Luff v. Horner*, 3 F. & F. 480. It is true that numerous dicta may be found which, taken by themselves, seem to be inconsistent with it, but in no class of cases is it so essential to read each judgment in connection with the particular facts, and taking each case as a whole, no decision can be found in conflict with *Wood v. Dixie*, or which cannot be easily distinguished from it. Moreover, most of the cases referred to are in equity, where the court are judges both of fact and law, and this must be always borne in mind, for observations are often relied upon as declaring the law which were really made in reference to the evidence and peculiar facts—in discharge, as it were, of the functions of a jury.

*Wood v. Dixie*, moreover, is in strict accordance with the statute when its provisions are carefully considered. It has been said that “*Wood v. Dixie* practically did away with the Statute of Elizabeth:” per John Wilson, J., in *Gottwalls v. Mulholland*, 15 C. P. 75; but it is submitted that it did away, not with the statute, but with an erroneous view of it, which up to that time had been prevalent. It was not to prevent the defeat or delay of creditors that the statute was intended, but to prevent that object being effected by means of feigned or fraudulent conveyances: *Hall v. Kissock*, 11 U. C. R. 12; *Bank of Toronto v. Eccles*, 2 E. & A. 74; and this has perhaps been sometimes lost sight of.

The statute, 13 Eliz. ch. 5, entitled “An Act against Fraudulent Deeds, Alienations, &c.,” leaving out superfluous words,

reads thus:—For the avoiding and abolishing of feigned, covinous, and fraudulent conveyances, which are contrived of fraud to the purpose and intent to delay, hinder or delay creditors, and to the overthrow of all true and plain dealing. Be it therefore enacted (sec. 2), that all and every conveyance of lands, goods, &c., made to or for any intent or purpose before declared, shall be, only as against those delayed by such fraudulent devices, utterly void, any pretence or feigned consideration to the contrary notwithstanding. (Sec. 3). That the parties to such feigned or fraudulent conveyances which shall maintain them as true and made *bonâ fide* and on good consideration, shall incur a forfeiture specified, one-half to go to the party grieved by such feigned and fraudulent conveyance.

These sections, taken together, clearly prohibit only what is feigned and fraudulent, as clearly as if in sec. 2, the words had been “all and every *such* conveyance,” &c. The use of the words “such feigned conveyance” in section 3 shews this, for every conveyance bad under section 2, was intended to be within section 3; and it is further shewn by section 6, which excepts from the Act an estate or interest upon good consideration and *bonâ fide* lawfully conveyed to any person not having notice “of such covin, fraud or collusion as is aforesaid.” *Bonâ fide* there means only that the transaction must be real, not feigned, and the estate intended to pass—not that there shall be no intent to delay creditors.

The two cases most relied upon for the appellant are clearly distinguishable. In *Bott v. Smith*, 21 Beav. 511, the facts were very peculiar. The consideration was to maintain the grantor, the grantee's father, for life, to pay £75 on his death to another son, and to indemnify against a mortgage. The whole consideration was carefully so contrived that no part of it could benefit the grantor's creditors, and it was upon this ground, as shewing fraud, that the judgment proceeded. There is an obvious distinction between the conveyance of property in that way, and the sale of it as here, for a sum of money, which might be used to pay creditors, and which now could be seized under execution:

C. L. P. A. sec. 261: *Gottwalls v. Mulholland*, 15 C. P. 70. *Holmes v. Penney*, 3 Kay and Johns. 90, was the case of a voluntary settlement.

It is attempted, however, to confine the decision (*Wood v. Dixie*) to the case of a preference, and to distinguish between that and a sale to a stranger; but this distinction cannot be supported. The head-note of the case is that "a sale of property" for good consideration is not void because intended to defeat an expected execution, and it has always been treated as so deciding: *Darvill v. Terry*, 6 H. & N. 810, per Wilde, B.; *Clark v. Morrell*. 21 U. C. R. 600, per McLean, C. J.; *Sm. Lea. Cas. I. 19*. *Hall v. Kissock*, 11 U. C. R. 9, was not a case of preference. In *Hale v. The Saloon Omnibus Co.*, 4 Drewry, 492, the transaction was a sale, and so also in *Bott v. Smith*, 21 Beav. 511, and *Luff v. Horner*, 3 F. & F. 480. In *Crawford v. Meldrum*, 3 E. & A. 101, the consideration was partly an old debt and partly a new obligation by bond. In *Sutton v. Bath*, 1 F. & F. 152, the assignment was to a creditor, but the distinction is not taken. In *McMaster v. Clare*, 7 Grant, 550, 558-9, the distinction is drawn, but the case is expressly decided on another ground—namely, that the plaintiff had no *locus standi* to attack the sale. In *Bank of Upper Canada v. Thomas*, 9 Grant, 321, 335, also the distinction is noticed, but there actual fraud was shewn, and was the ground of decision: *Wood v. Dixie* is referred to in both these cases.

The argument derived from cases where marriage is the consideration fails. There may in such cases be what is equivalent to a feigned deed, and to want of a consideration. The marriage itself may be "a mere fraudulent contrivance for defeating creditors:" *Mulholland v. Williamson*, 14 Grant, 295; *Commercial Bank v. Cooke*, 9 Grant, 535; *Fraser v. Thompson*, 1 Giff. 49: *Colombine v. Penhall*, 1 Sm. & G. 228.

On the facts of this case, when the conveyance was executed there could be no serious intention to delay creditors. VanDolsen then had no present interest, and it was most unlikely that he ever would have. His contingent interest



could not possibly have been sold then for anything, for there was no reasonable prospect of its ever being of any value.

On the 29th June, 1869, the following judgments were delivered :—

DRAPER, C. J. OF APPEAL.—The conveyances and the facts in evidence in this case are all fully reported in the 27th volume of the Queen's Bench Reports, 195.

I shall merely repeat the direction given by the learned judge to the jury at the trial—namely, that it was for their consideration whether the deed from Dolsen to Joseph Smith was a *bonâ fide* transaction, a deed made for valuable consideration, or whether it was fraudulently made, a mere contrivance for the purpose of delaying or defrauding creditors. To which direction it was objected, that the jury should be told that if they believed the money paid by Smith was paid to cover the property, and protect it from creditors, they should find for defendants, and if they believed Dolsen's evidence on the whole, they should find for defendants.

It appears to me that all the defendants had a right to ask was contained in the learned judge's direction, for it involved necessarily the enquiry whether the consideration was substantial in reference to the value of Dolsen's interest in the property at the time he conveyed it to Smith, whether that consideration was paid in order to acquire the title, and not to give colour to a scheme to defeat and delay creditors, and whether the object of Smith, and of Dolsen, was to defeat and delay creditors : in other words, whether the transfer of the property would have taken place if the intention to defeat and delay creditors had not existed in the minds of both these parties at the time of the transfer, and their acts were in furtherance of that intention. That the question was for the jury is beyond dispute.

I have again and again considered the case of *Wood v. Dixie*, and in the first instance because I had, very shortly before I had an opportunity of seeing it, laid down the

law to a jury to the same effect as Mr. Justice Coltman had done in that case. I think that case is a sound exposition of the law. It has been often discussed but never overruled. In the case of *Pennell v. Reynolds*, (11 C. B. N. S. 709), it is clearly shewn, that the intent to delay, &c., is a question for a jury, not for the court to pronounce upon. Whether there is evidence legally sufficient to impeach a conveyance on this question is for the court, but that is all.

I think the appeal should be dismissed with costs.

VANKOUGHNET, C.—I agree with the judgment in the court below. I assume that the charge of the learned judge was amplified beyond the report of it in the appeal book, for it is unusual and in fact impracticable for him to take down all that is said at *Nisi Prius*; and so assuming, it seems to me that the direction to the jury was sufficiently full, and in substance correct.

There has been much conflict of opinion upon the question involved in this case, but for myself I accept the law as laid down by Willes, J., in *Pennell v. Reynolds* (11 C. B. N. S. 722), and followed in the Court of Chancery here in *City Bank v. McConkey* (a). It is there said: "But there remains this most important question, namely, whether it was not manifest from the whole tenor of the evidence given by the bankrupt that this deed was concocted by Reynolds and himself for the mere purpose of staving off other claims—in other words, to defeat and delay the rest of the creditors. The advance of even a substantial part of the value of the property at the time of the assignment would not make the transaction valid, if there were in the minds of the parties the sinister object of defeating or delaying the creditors. The case might be put of an advance of £5 on the assignment of goods worth £1000. Such a transaction would obviously be invalid. But before we hold that a deed conveying property in consideration of a present advance which bears a substantial proportion to the value

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(a) Not reported.

of the property is invalid, we must be satisfied that there exists an intention to defeat and delay and consequently to defraud the creditors. And that object must be the object not only of the bankrupt, but also of the party who is dealing with him. A person dealing *bonâ fide* with the bankrupt would be safe. Unless he knows, or from the very nature of the transaction must be taken necessarily to have known, that the object was to defeat and delay the creditors, the deed cannot be impeached."

I concur in this statement of the law, and therefore in the conclusion arrived at by the majority of the court.

HAGARTY, C. J., C. P., adhered to his judgment in the court below.

SPRAGGE, V. C.—I cannot say that I think the charge of the learned judge unobjectionable.

The jury were told that the question for their consideration was whether the deed impeached was a *bonâ fide* transaction, a deed made for a valuable consideration; or whether it was fraudulently made, as a mere scheme or contrivance for the purpose of delaying, hindering, or defrauding creditors; if the latter, to find for the defendant: by which I understand that it was put to the jury that, on the one hand, the transaction was *bonâ fide* if the deed was made for a valuable consideration; in which case they would of course find for the plaintiff, who claimed under the deed; on the other hand, if made fraudulently as a mere scheme to defeat creditors, then to find for the defendant; this as an antithesis—*bonâ fide* if for value, fraudulent as a mere scheme to defeat creditors, if voluntary, *i. e.*, if made with that intent, and without valuable consideration.

We have probably only a brief summary of the charge, but I think that must have been the meaning of it, as the learned judge refused to tell the jury that if they believed that the \$200 paid, was paid to cover the property and protect it from creditors, they should find for defendant; and the judgments in the court below shew that it was so understood by the learned judges of that court.

It appears to me, therefore, clear, judging from the papers before us, that it was not put to the jury that if the object of the grantor in the deed was to defeat his creditors, and if that object was known to and concurred in by the grantee, the conveyance was, under the statute of Elizabeth, void as against creditors, although a valuable consideration may have been paid. I think the omission to put this to the jury was erroneous, and that a new trial should have been granted on the ground of misdirection.

I think the weight of authority is in favor of the proposition that a conveyance is not *bonâ fide*, within the meaning of the statute, where the object of the parties is to defeat creditors, although the transaction be real and without a secret trust, and for valuable consideration. The doctrine is as old as *Twyne's* case (1 Sm. L. C. 1) ; and in the time of Lord Mansfield was still the received doctrine of the courts. The language of his Lordship in *Cadogan v Kennett* (Cowp. 434) shews this. After saying that "the statute does not militate against any transaction *bonâ fide*, and where there is no imagination of fraud," and that "so is the common law," he proceeds thus: "But if the transaction be not *bonâ fide*, the circumstance of its being done for a *valuable consideration* will not *alone* take it out of the statute. I have known several cases where persons have given a fair and *full price* for goods ; and where the *possession was actually changed* ; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void."

In *Hall v. Kissock* (11 U. C. R. 9) in our Court of Queen's Bench, the late Chief Justice, Sir John Robinson, in quoting this language of Lord Mansfield, spoke regretfully of what he conceived to be the change in the interpretation of the statute established by *Wood v. Dixie* ; and referring to *Cadogan v. Kennett* said, "The law must be admitted, I think, to have been on a sounder and better footing when it was thus administered."

*Wood v. Dixie* has been quoted as the leading case for the opposite doctrine. In the court to which I have the



honor to belong, that case has always been looked upon as not establishing the opposite doctrine, and although some of the language is very general, the point decided is not inconsistent with *Cadogan v. Kennett*. In a case where a debtor had preferred one of two creditors to the other, it was, I apprehend, misdirection to tell the jury, as they were told by Mr. Justice Coltman, that if there really was a payment, that is by the creditor preferred, in other words, if there really was a debt, still if the intention was to defeat the execution creditor, the conveyance was void as against him. So in *Riches v. Evans* (9 C. & P. 640) there were several creditors, and a conveyance by the debtor to trustees for the general benefit of all in order to defeat one.

The charge of Mr. Justice Crompton in *Luff v. Horner*, (3 F. & F. 480), was certainly explicit enough: "If the transfer of the stock was really intended to take effect it would be valid, whatever its object." It was, however, only a charge at *Nisi Prius*, and the case was compromised while the jury were considering their verdict.

In *Hale v. Saloon Omnibus Co.* (4 Drewry 492), Sir R. Kindersley seems to have considered *Wood v. Dixie* as applying generally, and not to have adverted to the circumstance that it was a case of preference between creditors. In that case *Bott v. Smith* was not cited, nor was *Harman v. Richards* (10 Hare, 81), decided in 1852, nor *Holmes v. Penney*, decided in 1856. In fact the only case that appears to have been cited was *Wood v. Dixie*.

In *Holmes v. Penney* (3 Kay & Johns. 90), the present Lord Chancellor, then V. C. Sir W. Page Wood, cited with approbation the language of the court in the earlier case: "In the case of *Harman v. Richards* it was said by Lord Justice Turner that, if a settlement be made for valuable consideration, then the only question for the creditors is, whether it was made *bonâ fide*, for a deed, though made for valuable consideration, may be affected by *mala fides*." and the learned Vice Chancellor added his own observation: "The question is, was the object of the deed *bonâ fide*, or was there an intention to defraud creditors."

*Bott v. Smith* is a case of high authority, for it is not only the decision of Lord Romilly, but was affirmed upon appeal by the Lords Justices Knight Bruce and Turner.

Even *Wood v. Dixie* itself has this qualified language of Lord Denman: "We are clearly safe in going so far as to say, that a mere intent to defeat a particular creditor does not constitute a fraud. We do not say that many considerations may not exist which would induce a jury to come to the conclusion which they have arrived at," (namely, that the impeached conveyance was void), "but we hold the direction wrong." I cannot help thinking that this case has been made to apply much beyond the intention of the learned judges by whom the judgment was given.

If this were a case of first impression, instead of the subject of numerous decisions, I certainly should not myself hesitate to construe the act as avoiding all the acts therein specified by which creditors are hindered, and done with that intent on the part of both parties, whether a valuable consideration passed between them or not. Take the declared object of the act, "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts," &c.; and then in the second clause speaking of the intent and purpose of the acts, "to or for *any* intent or purpose before declared and expressed,"—not collectively, that the act must be feigned *and* fraudulent, but it is avoided if either one or the other is the intent or purpose. Take again the language of the sixth section of the act, which saves the rights of purchasers for good consideration *and bonâ fide*, and not having notice or knowledge of such "covin, fraud, or collusion as is aforesaid." This, as a statute against frauds, should, upon the rule that all statutes against fraud should be liberally and beneficially expounded to suppress the fraud, be so interpreted.

Looking at the statute itself, apart from decisions upon it, it is hard to see any warrant for taking out of its operation any conveyance made with the intent and purpose of defrauding creditors, both grantor and grantee concurring in that intent and purpose, merely because a valuable consideration

is given. It is importing into the act an exception which the statute does not make in terms or by implication, and contravening to that extent its express provisions.

In the majority of cases no valuable consideration passes; and where there is valuable consideration, it is all the more difficult to prove the intent to be, to defraud creditors, and so Lord Justice Turner adds to what I have quoted from his language in *Harman v. Richards*, this observation: "But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration have, I think, a task of great difficulty to discharge." This must be granted, but the difficulty of proof of a fact is obviously no ground for ignoring that fact in cases where it is proved.

It is quite clear that it is a fact capable of proof. It may be proved to be the avowed object of both the parties, as agreed and declared between themselves; it may be an irresistible inference from their conduct. To take the most ordinary way in which the claims of creditors are sought to be evaded in this country, the conveyance of the land of the debtor; the person to whom it is conveyed may not have the slightest wish to acquire the land, he may know perfectly well that the only motive on the part of the debtor, the grantor, is to defraud his creditors, or some one or two creditors in particular; and he may take the conveyance and pay valuable consideration with the same and no other motive. He gets value for what he pays; and if at the same time he can serve some purpose or gratify some desire of his own—it may be to injure the creditor, or merely to assist the debtor at his expense, or for some of the other reasons or purposes which influence the minds of men,—he may join with a fraudulent debtor in defeating his creditors.

It is no answer that such cases are rare, and that they are difficult of proof. They do occur, and they are susceptible of proof. Suppose such a case, and so clearly proved as to carry conviction to the mind of any reasonable man, is it correct to tell a jury that the law does not apply to such a case? Is such a conveyance *bonâ fide*? It may be not *feigned*; but is it not covinous and fraudulent, and is not the grantee

*particeps fraudis* ? I do not say that the case now in judgment is a case of that character, nor is it necessary for the purposes of this judgment that I should come to that conclusion ; but I think that it should have been put to the jury, that, although they might find that the conveyance was for value, still if they found that the intent and purpose of both grantor and grantee were to defraud creditors, they should find for the defendants ; and this not having been put to them, one element essential to their proper consideration of the case was, in my judgment, withheld from them.

In the judgment pronounced in the court below, the learned Chief Justice of the Common Pleas seems to apprehend danger from such a doctrine ; and he puts the case of a sale by a debtor in order to realize money to pay creditors. Such a case would unquestionably *not* be within the statute. I fully admit that to bring a case within the statute, a fraudulent intent on the part of the debtor, and a concurrence in it, an aiding of it, on the part of the purchaser, must be proved, and proved satisfactorily. But when that is so proved, then they are both parties to a fraud for the suppression of which the statute of Elizabeth is especially directed ; and their conveyance, or whatever their device for defrauding creditors, is, in my judgment, against both the letter and spirit of the statute, and void.

It may be (as has been suggested), that the note made by the learned judge who tried the cause is but a meagre outline of his charge to the jury, and that the doctrine I have contended for was not withheld from their consideration. All I have to say upon that is, that the appeal book, the terms of the rule *nisi*, and the judgment of the court below, do not appear to me to leave room for such a supposition. But however that may be, as a matter of fact, a simple affirmation by this court of the judgment of the court below would negative the doctrine which I think the right one, and would establish as the law of this province, that a debtor and a third person may conspire together fraudulently to defeat creditors, and, provided a valuable consideration



passes, they may do so lawfully. I think it all important, therefore, that the direction which appears upon this record to have been given to the jury should not go forth as the law of this court, unless it is the deliberate judgment of this court that such is the law.

Looking at what appears upon the papers before us, my conclusion is that there was misdirection, and that the rule for a new trial should have been made absolute.

HAGARTY, C. J. C. P.—I concur in much that has been said by my brother Spragge, but I assume, and the case on both sides was argued on the assumption, that the charge was in truth substantially what in his judgment it should have been.

GWYNNE, J.—The question here is not whether the jury might or not, under the circumstances proved in evidence, have arrived at a different conclusion than that which they did arrive at, as to the *bonâ fides* of the consideration, but whether the charge of the learned judge, which was, as admitted in argument, in accordance with the law as laid down in *Wood v. Dixie*, was a misdirection.

We must be governed by that case, the principle of which is now, I think I may say, universally adopted by all the courts of law and equity in England. Mr. Strong cited several cases, some prior and some subsequent to *Wood v. Dixie*, which he contended were wholly at variance with that case. As to those prior to it, I shall not refer to them, further than to say that such of them as may be either manifestly or apparently at variance with it must now be treated as overruled by it, but as to those contemporaneous with, or subsequent to the case, I do not think they are open to the imputation.

*Fraser v. Thompson* (1 Giff. 49, 4 DeG. & J. 659) proceeded upon the principle that at the time of the settlement the property settled had already passed out of the settlor by the operation of the bankrupt law.

*In re McBurnie* (16 Jur. 808, 1 DeG. M. & G. 441) the

contention was that the settlement upon the wife was a fraud upon the Bankrupt Laws. It was held not be. Knight Bruce, V. C., there says: "It is not necessary to say what would have been the result if the *bonâ fides* of the wife were impeached in any manner other than by the mere appearance and nature of the settlement; as, for instance, by the settlement being so out of proportion to the station and circumstances of the husband as to raise a presumption as of necessity, in the opinion of the court, to make the wife suspect something improper—something out of the ordinary course of things," plainly implying, as I think, that in such a case the court might infer that the marriage was not the *bonâ fide* consideration for the settlement, but that the settlement was made independently of that consideration, and for the purpose, under cover of the marriage, to commit a fraud upon the bankrupt laws.

Neither *Wood v. Dixie* nor any case of that class was cited as supposed to be in point in the case, as in truth they were not.

*Colombine v. Penhall* (1 Sm. & G. 228) was the case of a fraudulent marriage consideration—that is, a marriage contrived for the express purpose of evading the bankrupt law.

*Holmes v. Penney* (3 K. & Johns. 90) was assailed as a voluntary settlement. It was defended as a *bonâ fide* purchase, and the evidence so shewed it to be. Wood, V. C., as to this case says that the statute of Elizabeth could not be relied on to invalidate such a deed, for which valuable consideration had been given, and where there was *bonâ fides* in the party from whom the consideration moved; and even where the deed is voluntary, that circumstance alone will not bring it within the statute. The Vice Chancellor there, as it appears to me, is speaking of the *bonâ fides* of the consideration, and so is in accord with *Wood v. Dixie*, although it was not cited as a case having a bearing upon the point in issue there, the conveyance having been assailed as voluntary.

*French v. French* (6 DeG. M. & G. 95) was a case of a voluntary settlement.

*Graham v. Chapman* (12 C. B. 85) was a case of a deed of the conveyance of a man's whole property, partly in consideration of an antecedent debt and partly of a small present advance. It was held to be an act of bankruptcy, in consequence of the antecedent debt forming part of the consideration, as appears by *Hutton v. Cruttwell* (1 E. & B. 15).

*Smith v. Cannan* (2 El. & Bl. 35), was the conveyance by a trader of the whole of his estate to one creditor to secure a debt, and an amount also for which the creditor was surety. This was held to be an act of bankruptcy.

*Pennell v. Reynolds* (11 C. B. N. S. 709), was the case of a conveyance by a trader of all his estate and effects in like manner to a creditor, to secure past advances and a small present one, and this also was held an act of bankruptcy.

In *Bott v. Smith* (21 Beav. 511), upon which Mr. Strong chiefly relied, it was contended by counsel that the deeds were really voluntary and the consideration inadequate, and that even if the full consideration had been given, still the conveyances might be void if executed with a fraudulent intent to defeat creditors. With respect to this latter point *Wood v. Dixie* is not cited, but the cases which *Wood v. Dixie* overrules are. The observations of the Master of the Rolls, from the whole context, as it appears to me, are not to be attributed to him in the discharge of his duty as a judge deciding a point of law, that a *bonâ fide* purchase will not take a case out of the statute, but to him in the discharge of his duty as a jury, expressing his opinion upon the facts, that the moving consideration was not a purchase and sale, but the express consideration of defeating creditors, and that therefore he arrived at the conclusion in fact, as the jury might have done here if the evidence justified them, that the consideration was not *bonâ fide*, but a mere pretence to cover the fraudulent intent.

Now that none of these cases were regarded either by the counsel arguing them or the judges deciding them as in dis-

approval of or at variance with *Wood v. Dixie*, may reasonably be inferred from the fact that it is cited in none of them; whereas in *Hale v. The Saloon Omnibus Company* (4 Drewry, 492,) where it is cited, it is recognized and followed, while *Bott v. Smith* is not there referred to at all, shewing very clearly that the court did not regard *Bott v. Smith* as a case in point affecting the *principle* of the decision in *Wood v. Dixie*.

Upon a review then of all the cases, it appears to me that the principle of *Wood v. Dixie* is recognized as undoubted law at the present day, in all the courts both of law and equity.

MORRISON, J., and ADAM WILSON, J., concurred with DRAPER, C. J. of Appeal.

*Appeal dismissed.*

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EASTER TERM, 32 VICTORIA, 1869.

(From May 17th, to June 5th, 1869.)

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*Present :*

THE HONORABLE WILLIAM BUELL RICHARDS, C.J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

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PATTERSON V. THE CORPORATION OF THE TOWN OF  
PETERBOROUGH.

*Town corporation—Obstruction of water course—Liability.*

The declaration charged that the defendants, the municipal corporation of a town, on the 1st March, 1868, and on divers other days, penned back the water of a stream in the town, on which the plaintiff had a tannery, so that it flooded his land, &c. The obstruction complained of was a bridge along a street in the town, where there had been a bridge for about 30 years. One D., who owned land on the stream below the bridge, had a wheel in the stream, and parties above him cut away and sent down the ice in the spring, which formed a jam at D's, and filled the stream from thence up to and under the bridge. The weight of evidence tended to shew that but for this obstruction at D's, the plaintiff would not have been injured. It was left to the jury to say whether the injury complained of was caused by the bridge, or by the ice jam at D's, irrespective of the bridge, and they found for the plaintiff.

*Held* a misdirection : that they should have been told, if the damage was caused by persons sending ice down, which lodged against the bridge, and not by the ordinary action of the ice, defendants were not liable. And *Seemle*, that upon the declaration and evidence the plaintiff could not recover, for it was defendants' duty to build the bridge there, and no negligence was charged.

DECLARATION—First count, that the plaintiff on the 1st March, 1868, and thence hitherto, was possessed of a tannery and land adjoining the stream or water-course in the town of Peterborough, known as the Creek, and was entitled to have the waters of such water-course flow away from the tannery and land ; and the defendants on the 1st of March and

divers days thereafter, penned back the water of the stream or water-course, and obstructed the same, so that it could not flow by and away from the said tannery and land, whereby the water of the stream overflowed and flooded the said tannery and land, and remained thereon for a long time, and spoiled the tan vats, hides and liquors therein, and the stock, machinery and materials of the plaintiff therein, and the land and tannery thereon were much injured and damaged, and the plaintiff was deprived of the use thereof, and incurred expense in removing the water from the same and repairing the same, and the same were thereby much injured and diminished in value, and the plaintiff was by means of the premises much injured in his said trade or business and otherwise.

The second count was in effect the same as the first, except that it averred that the plaintiff was in possession of land adjoining the water course, and had the right to have the waters flow away from the same, and that defendant penned back the water of the creek on his lands, causing damage, &c., as in the other count, but omitting the tannery. The plaintiff claimed \$500 damages, and an injunction against the continuance of the injury, and against the commission of injury of a like kind to the same property.

Defendants pleaded,

1. Not guilty.
2. That the plaintiff was not possessed of the tannery and land as alleged.
3. That the plaintiff was not entitled to have the stream or water-course flow by and away from the said tannery and land as alleged.

These three pleas were to the first count of the declaration, and similar pleas were pleaded to the second count.

The plaintiff joined issue on all the pleas.

The cause was taken down to trial at the Fall Assizes of 1868, at Peterborough, before Hagarty, J.

There was evidence offered on the part of the plaintiff, to shew that in the month of March, 1868, ice had lodged against a bridge constructed by defendants along a street in

the town of Peterborough, over a stream that passed through premises occupied by the plaintiff: that the lodging of the ice there in the spring of the year formed an ice dam, or jam, as it is called, and this penned back the water on the plaintiff's premises, flooded his tan vats, and injured him to the extent of about \$418, as shewn by his evidence.

A witness for the plaintiff said, in relation to the water being penned back, there was not the slightest doubt but that this was caused by the bridge: that the defendants took up the floor of the bridge and broke up the ice, and the damage ceased at once. This witness did not think obstructions by one Doherty, lower down the stream, backed the water to the injury of the tannery.

For the defence it was shewn that a bridge had been erected across the stream at the place complained of for more than thirty years: that one Doherty owned premises further down the stream than the bridge: that the corner of one of his buildings was erected in the stream, and that he had a wheel also that was in the stream: that parties having mills on the stream above the plaintiff's premises, in the spring of the year, when the water rose, cut away the ice and sent it down the stream: that it lodged at Doherty's, and formed a jam, and the stream filled with ice up to the defendants' bridge, and then the ice which came down from above lodged about the bridge: that as soon as the jam was cleared below, from Doherty's up to the ice at the bridge, all passed away: that the floor of the bridge was taken up to aid in removing the ice dam or jam, and after that was done all passed away: that had it not been for the obstruction at Doherty's, there would have been no injury: that defendants' bridge did not cause the jam at all, and if it had not been there the jam at Doherty's would have caused the injury. One of the defendants' witnesses said he considered if the bridge was removed, the artificial work in the stream below it would have caused the damage. He also thought the bridge would cause this obstruction, even if the artificial work below was not there.

At the end of the case, defendants' counsel objected that

defendants were not liable on the evidence: that the bridge was erected in the ordinary course of their duty, and that the obstruction in the flow of the stream was caused by sending the blocks of ice down the stream by parties above, and not by the ordinary action of the ice.

The learned judge stated that the case turned on the plea of not guilty: there was damage done, and he left it to the jury to say by whom,—by the defendants' bridge, or by the ice jam at Doherty's, irrespective of the bridge.

On this direction the jury found for the plaintiff, damages \$100. The plaintiff's counsel took the same objections to the charge of the learned judge that he took at the close of the case.

In Michaelmas Term, *C. S. Patterson* obtained a rule *nisi* to set aside the verdict, as being contrary to law and evidence and the weight of evidence, in this, that it was shewn that the obstruction which injured the plaintiff was not caused by the defendants' bridge, but by a stoppage of the stream at a place lower down the stream than the bridge; and because it was not shewn that the bridge caused any obstruction, or that it was calculated to cause any obstruction in the natural flow of the stream; and because the obstruction was shewn to have been caused by ice which did not come down in the natural flow of the stream, or by reason of the natural thaw, but was sent down the stream by persons who broke it up from the mill-ponds; and because it was not shewn that the defendants had constructed their bridge in a negligent or improper manner, or had done any act beyond what they were required by law to do; and for misdirection of the learned Chief Justice, in ruling that the declaration would be supported by evidence of an obstruction caused by the lodgment against the bridge of bodies of ice sent down the stream, notwithstanding that the bridge would not obstruct the stream in its natural flow.

The rule was enlarged until this Term, when *J. H. Cameron*, Q. C., shewed cause. The simple question on not guilty was, whether the defendants, by the construction of



the bridge, penned back the water on the plaintiff's premises, so as to cause him damage. That damage was done by penning back the water is not denied. There is evidence that it was caused by the bridge, and the jury, who had a view of the place, were competent to judge whether the plaintiff's contention, that the injury was caused by the defendants' bridge, was correct or not. If they thought it had arisen from other causes, they would have found for defendants.

The action is not brought for negligently constructing the bridge, but simply for penning back the water on the plaintiff. If the water was thrown back by the bridge, and the defendants wished to justify the erection of the bridge as in discharge of their duty, they should have so pleaded; but the general issue merely denies the fact of the flooding, and there was evidence to go to the jury that it was caused by the bridge. *Harrold v. The Corporation of Simcoe*, 18 U. C. R. 9.

*C. S. Patterson*, contra. The weight of evidence is clearly with the defendants. They were by law bound to build the bridge; they were guilty of no negligence in what they did, and cannot properly be held responsible for the injury sustained by the plaintiff. Besides, the learned judge should have told the jury that the act of the parties above caused the jam by sending down the ice improperly, and that they should find for the defendants on not guilty. At all events he should have told them that defendants would not be liable if their bridge would not have obstructed the ice in its usual and natural condition, and if the jam was caused by the ice above being sent down in too large quantities, though the bridge might have obstructed that, they should have found for defendants. *Croft v. Town Council of Peterborough*, 5 C. P. 141; *Sutton v. Clarke*, 6 Taunt. 29; *Municipality of Thurlow v. Bogart*, 15 C. P. 9; *Corporation of Wellington v. Wilson*, 16 C. P. 124; *Fitzsimons v. Inglis*, 5 Taunt. 534; *The King v. Tindall*, 6 A. & E. 143; *The Queen v. Russell*, 3 E. & B. 942; *The Queen v. Betts*, 16 Q. B. 1022; *Blyth v. The Birmingham Water Works Co.*, 2 Jur. N. S. 333; S. C. 11 Ex. 781.

RICHARDS, C. J., delivered the judgment of the court.

It will be very difficult to come to the conclusion that this action can be maintained against the defendants in the present form of the declaration, and on the evidence given. There is no doubt that the defendants had the right and were bound to maintain a bridge on the street in question, and that their only liability to the plaintiff must arise from doing that which they are at liberty and bound to do in an unskilful manner. The plaintiff does not sue the defendants for any breach of duty, but simply charges them, not with doing some act that occasions him injury, but on the first of March and divers days and times afterwards, with penning back the water of the stream and obstructing the same, whereby it overflowed the plaintiff's land. The defendants did not do this on the first of March, and divers, &c., but, on the contrary, more than twenty years ago built a bridge, and in 1850 built the present one; and that is all they did towards penning back the water.

We do not understand from the evidence that there was any ground of complaint when the bridge was built, or any perceptible penning back of the water, or any injury done to any one until within a few years past. It seems to us the allegations in the plaintiff's declaration are no more sustained by the evidence than they would be if trespass were brought against a person for throwing a log on the highway whereby plaintiff was injured, when the evidence shewed the log had been cast on the highway a month before the plaintiff was injured; and the very illustration given in *Chitty* on Pleading, shewing the distinction between trespass and case, 7th ed. Vol. I. p. 142, applies to the case before us. He says: "If a person place a spout on his own building, in consequence of which water afterwards runs therefrom into my land, the damage is consequential, because the flowing of the water, which was the immediate injury, was not the wrong-doer's immediate act, but only the consequence thereof." Here it is even doubtful if the penning back of the water is in consequence of defendants' act at all.

The case of *Fitzsimons v. Inglis* (5 Taunt. 534), is an

express authority in favor of the defendants' contention. There the plaintiff declared that the defendant wrongfully placed and continued a heap of earth, whereby refuse matter was prevented from flowing away from his house down a ditch at the back thereof. The evidence was that the heap was not originally placed so as to obstruct the water, but that in process of time earth from the heap was trodden and fell into the ditch. Held, that it was a fatal variance.

In *Griffiths v. Marson* (6 Price 1), where the third count of the declaration was for wrongfully diverting and turning divers large quantities of the water of the stream out of the usual course, the plaintiff proved that the defendant's son had let down the rear of the dam, whereby the plaintiff's meadow was flooded and damaged by checking the course of the stream. The plaintiff was nonsuited. The court held that in actions of this nature it was necessary that the count relied on should be so framed as to meet the particulars of the fact more distinctly, and with greater certainty.

In *Chitty on Pleading*, vol. ii., 7th ed., p. 601, in a note, it is said, "It seems that a declaration for obstructing a water course without shewing how, is bad on demurrer, but not after verdict: *Ld. Ray* 452. *Sed quære*. The injurious act should be described according to the fact, and a count for diverting and turning, &c., is not supported by proof of penning back and checking a stream." Reference is made to 6 Price 1, and 5 Taunt. 534.

In *Woolrych on Waters*, at p. 317, the learned author states, "The particular mode of obstruction cannot be too carefully described." He then refers to the cases in 5 Taunt. and 6 Price, and also states that *Shears v. Wood*, cor. Wood Baron, at Guildford, 7 Moore, 345, though later in point of time, seems hardly reconcilable with the prior cases.

The case in Moore is abstracted in Mr. *Woolrych's* work. The action was for diverting water from the plaintiff's mills. The obstruction charged in the declaration was putting a dam across the stream, and cutting above and higher in the stream, so that large quantities of the plaintiff's water were thereby diverted, and the accus-

*tomed* flow of the water was stopped. There was a general count for turning the water out of its usual course. The evidence was, that the defendant put down the dam in question about a mile above the plaintiff's mills, and this had prevented the water from being regularly supplied, but that the water was not thereby diverted, because it returned to its regular course long before it reached the plaintiff's mills, and there was no waste of water. It was proved that the plaintiff had sustained injury by reason of the interruption of his regular supply. It was objected that the mischief had been misdescribed in the declaration, for the complaint should have been that the water had been irregularly or insufficiently supplied, or that it did not reach the plaintiff's mills at the proper and the usual time. The jury having found for the plaintiff, it was moved to enter a nonsuit, but Mr. Justice Burroughs said, that it was in fact stated in the declaration that the water did not run to the plaintiff's mill as they were accustomed to have it, and that this was a mere technical objection, which ought not to be allowed after verdict. The rest of the court concurred, and the nonsuit was refused.

Notwithstanding the decision arrived at in the case just referred to, we do not see our way clear in holding that the plaintiff can recover under the declaration and evidence in this case.

There is no doubt that the mere erection of the bridge has not, and does not pen the water back on the plaintiff's land, and the weight of evidence, as we understand it, certainly is that the obstruction which makes the water flow back is caused by the large quantity of ice sent down the stream from above, which lodging below, and, as the plaintiff contends, at the defendants' bridge, pens the water back. It is not pretended that the penning back of the water results immediately from the act of the defendants, and what the defendants are really liable for, if liable at all, is building a bridge whereby the water, at certain seasons, was penned back from ice being sent down and lodging against it.

If the defendants, in building their bridge or after it



was built, placed materials in the stream so as to pen back the water on the plaintiff's land, then the averment in the declaration, that the defendants had penned back the water of the water-course and obstructed the same, might have been sustained. If in the usual and natural process of the ice passing out of the stream in the spring, it lodged against the bridge and penned back the water, it might be argued with more force that the defendants had done it directly, as seems to be the effect of the averment in the declaration ; but when the difficulty is caused by other parties doing that which immediately causes the injury, and all that can be charged against the defendants is the want of care or skill in constructing the bridge, it seems to us that in this mode of declaring the plaintiff cannot succeed.

On a declaration framed so as to bring the real wrong, if any, committed by the defendants in issue, they would be able to raise the question properly and without difficulty, whether, in discharging the duty cast upon them by the act of parliament, they had by their servants used reasonable skill and diligence in constructing the bridge, in relation to ice or other obstructions likely to come down the stream.

We think leaving the question to the jury, simply whether the damage was done by the defendants' bridge or by the ice jam at Doherty's, irrespective of the bridge, was not putting it before the jury in the way the defendants had a right to have it put, and that they should have been told if the damage was caused by persons sending blocks of ice down the stream which lodged against the bridge, and not from the ordinary action of the ice, and that the lodging of the ice caused the penning back of the water, they should find for the defendants.

We understand the defendants' counsel so desired the learned Chief Justice to charge the jury, and that he declined doing so.

We are all of opinion there should be a new trial, without costs.

*Rule absolute.*

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## THE QUEEN V. McCANN AND JEVONS.

*Attempt to commit burglary—Evidence of.*

The prisoners being indicted for an attempt to commit burglary, it appeared that they had agreed to commit the offence on a certain night, together with one C., but C. was kept away by his father, who had discovered their design. The two were seen about 12 that night to come within about 13 feet of the house, towards a picket fence in front, in which there was a gate; but without entering this gate they went, as was supposed, to the rear of the house, and were not seen afterwards. Afterwards, about 2 o'clock, some persons came to the front door and turned the knob, but went off on being alarmed, and were not identified. *Held*, that there was no evidence of an attempt to commit the offence, no overt act directly approximating to its execution; and that a conviction therefore could not be sustained.

CRIMINAL case reserved.

The prisoners were indicted, for that they, on the night of the 18th March last, unlawfully did attempt feloniously and burglariously the dwelling house of E. Kerr, &c. to break and enter, with intent the money, &c., of the said E. Kerr in the said dwelling house then feloniously and burglariously to steal, &c.

At the trial, at Toronto, before Gwynne, J., it was proved that the prisoners and one Thomas Conran had agreed to break and enter the house of Mrs. Kerr on the night of the 18th of March, with intent to steal her money, the prisoner Jevons professing to know that Mrs. Kerr had money and where it was left, and it appeared that the three were to proceed from the prisoner Jevons's house to Mrs. Kerr's.

Conran did not meet the prisoners at the time appointed; his father having heard of the intended offence detained him at home.

The evidence upon which the question turned was that of the father, James Conran, who testified, that becoming acquainted with the intended robbery, he and two others, one being a constable, went to Mrs. Kerr's place for the purpose of watching the parties, having first told Mrs. Kerr their object: that at about a quarter past twelve, midnight he saw men enter a gate about fifty feet from the house; they came towards the house to a picket fence in front,

in which there was a small gate: that they did not come nearer to the house than twelve or thirteen feet, nor did they pass the picket gate; they then went, as supposed, to the rear of the house, and they were not seen afterwards: that at about five minutes past two o'clock some persons came round again to the front door and raised the knob. At this time Mrs. Kerr called out to put on some more fire, which the witness thought alarmed them, whoever they were; and the witness said he had no doubt that the persons whom he first saw approach the house were the prisoners.

On his cross-examination he said the picket gate was open, but they, the two men seen at twelve o'clock, did not enter it; they looked pretty close at the house, and went round to the north side, and he saw them no more. When the handle of the door was moved the witness was sitting at the same window; the parties at the door did not come through the picket gate fence; how they went away he did not see.

One McGregor corroborated Conran in seeing the two men, but could not identify them.

The learned judge entertained doubts as to the sufficiency of the testimony to support the act of attempting to commit the offence charged, and he left the case to the jury to say whether the prisoners committed the alleged offence, and whether they intended the criminal intent charged. The prisoners were convicted; and the question reserved was, whether, admitting the prisoners' intent to have been to commit the burglary, the evidence was sufficient in law to establish the attempt charged, and whether therefore the conviction should stand.

*Bethune*, Q.C., for the Crown, cited *Russ. C. & M.*, 4th ed., 84; *Rex v. Schofield*, Cald. 400; *Rex v. Higgins*, 2 East, 5; *Rex v. Phillips*, 6 East 464.

*McMichael*, for the prisoners.

MORRISON, J., delivered the judgment of the court.

We are of opinion that the conviction cannot be sustained. The evidence discloses no attempt to commit the offence

charged—no overt act to carry out that attempt. The bare fact that the prisoners were seen looking at the house at the distance of thirteen or fourteen feet is not of itself a crime, and although it may be said they were near the premises upon the understanding previously entered into, yet there is no evidence of the fact. For all that appears, they may have changed their mind, and in the absence of their comrade went there with some other object or for some other purpose, and not with the intent charged.

If it had been proved that they attempted to enter the house, and were either interrupted or surprised in doing so, and made their escape, and that but for such surprise or interruption they could have carried out their design of stealing the money said to be in the house, there would have been evidence to go to the jury. The fact that about two o'clock in the morning some persons, not seen or identified, turned or raised the knob of a door, was not evidence against the prisoners.

All that was proved against the prisoners was an intention expressed on one occasion to commit the offence charged. The utmost that could be presumed against them was, that they approached the house with that intention, and went away without attempting to carry out their previous design.

As said by Cockburn, C. J., in *Regina v. McPherson* (1 Dears. & Bell C. C. 197); "Attempting to commit a felony is clearly distinguishable from intending to commit it." The bare wish or desire of the mind to do an illegal act is not indictable: Per LeBlanc, J., in *Rex v. Higgins* (2 East, 5); and, as laid down by Lord Mansfield, in *Rex v. Scofield* (Cald. 403), "So long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done." The whole subject is discussed at length in these two cases.

In the case of *Regina v. Taylor* (1 F. & F. 511) where the prisoner was indicted for an attempt to set fire to a stack, and it appeared in evidence that, after threats to burn the prosecutor out, he was seen to go to a neighbouring



stack, and kneeling down close to it struck a lucifer match, but discovering that he was watched, blew it out and went away. Pollock, C.B., told the jury that if they thought the prisoner intended to set fire to the stack, and that he would have done so if he had not been interrupted, this was in his opinion a sufficient attempt to set fire to the stack, within the meaning of the statute. "It was clear," he said, "that every act committed by a person with the view of committing the felonies therein mentioned, was not within the statute (9 & 10 Vic. ch. 25); as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." So in this case, the act of approaching the house would not be an act sufficiently proximate and directly tending to the execution of the offence charged.

We also refer to the case of *The Queen v. Collins et al.* (33 L. J. N. S. M. C. 177); and *Dugdale v. The Queen* (1 E. & B. 435).

We are of opinion that the conviction cannot be sustained, and that an entry be made on the record that the prisoners ought not to have been convicted.

*Conviction quashed.*

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THE OTTAWA AND RIDEAU FORWARDING COMPANY V. THE  
LIVERPOOL AND LONDON AND GLOBE INSURANCE  
COMPANY.

*Fire insurance—Change of occupation—Increase of risk—Carpenters and painters—Pleading.*

Defendants insured two buildings, each for different sums, by a policy which provided that in case any alteration or addition should be made in or to any risk, whether by the erection of apparatus for producing heat, or the introduction of articles more hazardous than allowed, or change in the nature of the occupation, or in any other manner whatsoever by which the degree of risk was increased, and an additional premium would be required, without notice and allowance thereof, the policy should be void.

A plea setting up a defence under this as to one building, alleged that an alteration was made in the risk, within the meaning of the condition, by the plaintiffs having suffered a change in the occupation of the building, and by the introduction therein of painters who worked therein and thereon at their trade; and that another alteration was made in said risk by the plaintiffs having permitted a change in the occupation of the other building insured, which adjoined building No. 1, and by the introduction therein of carpenters who worked therein at their trade—whereby, and by means of such said alterations, the risk on said building No. 1 was increased, &c., &c.

*Held*, that the pleas were good; that the means by which the risk was increased could not be rejected as surplusage, as defendant contended, but that what was alleged as to the change of occupation might have increased it, and whether it did so or not was for the jury.

A mere temporary introduction of painters or carpenters, for repairs, &c., would not avoid the policy. *Quære*, therefore, whether in this respect the plea was sufficient. *Semble*, that it was, because the court could not judicially know whether what was alleged on that point could increase the risk; but it was suggested that the plaintiffs should reply specially the circumstances under which the painters and carpenters were introduced.

*Quære*, as to the distinction between change “in the occupation” and in the “nature of the occupation” of a building.

DECLARATION on a fire policy on two buildings—on building No. 1, \$1000; on building No. 2, \$400.

The second condition which was set out in the declaration stated: “That in case any alteration or addition be made in or to any risk on which any assurance has been effected, whether such alteration or addition do consist in the erection on the premises of apparatus for producing heat, or in the introduction of articles more hazardous than may be allowed in the policy, or change in the nature of the occupation, or in any other manner whatsoever by

which the degree of risk is increased and a consequent additional premium would be required, and whether such insurance has been effected on the building itself or on goods, wares, or merchandize, deposited therein, and the assured shall not have given notice thereof respectively to the said company or its agent in writing, and unless such alteration or addition shall be allowed by endorsement on this policy, and such increased premium paid as may be required, such policy or insurance shall be null and void."

Third plea, as to so much of the declaration as relates to the building therein mentioned marked number one, and the said sum of \$1000 insured thereon, and the plaintiffs' cause of action in respect thereof—that after the making of the policy, and before the said fire, and during the risk on the said building, an alteration was made in the risk on said building, within the meaning of the second condition endorsed on the said policy in that behalf, by the plaintiffs having suffered and permitted a change in the occupation of the said building, and by the introduction therein of painters who worked therein and thereon at their trade of painters; and during the time aforesaid a certain other alteration within the meaning of said second condition was also made in the said risk on said building, by the plaintiffs having suffered and permitted a change in the occupation of the other building mentioned in said declaration marked number two, and which adjoined said first mentioned building, and by the introduction therein of carpenters who worked therein at their trade of carpenters, whereby, and by means of each and either of said alterations, the degree of risk on said building, marked number one, was increased, and a consequent additional premium would be required; and no notice of said alterations, or of either of them, was given to the defendants or their agents in writing, nor were nor was such alterations, or either of them, allowed by indorsement on the said policy, nor was any increased premium paid therefor, or for either of them, whereby the said policy became and was null and void.

The fourth plea was the same to building No. 2 as the third plea to building No. 1.

Demurrer to both pleas, assigning for cause that the second condition does not disclose the change in the nature of the occupation by which the degree of risk would be increased, and that the introduction of carpenters and painters is not such a change in the nature of the occupation as would increase the risk.—Joinder.

*Harrison*, Q. C., supported the demurrer. Although the risk was increased by the introduction of carpenters and painters into the buildings, their introduction was not an alteration or addition or change of occupancy, within the meaning of the second condition : *Stokes v. Cox*, 1 H. & N. 533 ; *Baxendale v. Harvey*, 4 H. & N. 445. "Alteration" means a permanent and not a temporary change : *Gould v. British America Assurance Company*, 27 U. C. R. 480 ; *Dobson v. Sotheby, M. & M.* 90 ; *Shaw v. Robberds*, 6 A. & E. 75 ; *Pim v. Reid*, 6 M. & G. 1 ; *Barrett v. Jermy*, 3 Ex. 535. "Change of occupation" means *change of persons*, not of business : *Gould v. British America Assurance Co.*, 27 U. C. R. 480 ; *Todd v. Liverpool, &c., Insurance Co.*, 18 C. P. 200 ; *Glen v. Lewis*, 8 Ex. 607. The plea does not state that the carpenters or painters brought into the house any materials or articles of their trade, so as to have increased the risk.

*S. Richards*, Q. C., contra.—The pleas are, that there was an increase of risk by the introduction of painters and carpenters, because there was an alteration of the risk. The alteration was by a change in the occupation by means of these workmen working at their trade. If the risks were not increased, or if there was no alteration in the occupancy, because the occupation by the workmen was not permanent, the plaintiffs should have traversed these allegations. It was argued that these pleas should have stated how the risks were increased, and how the alteration was made, and what was the nature of change in the occupation, with more particularity ; but the pleas are sufficient, and warranted by the authorities. In *Reid v. The Gore District Mutual Insurance Co.*, 11 U. C. R. 345, the 4th



and 5th pleas were in a general form; in *Merrick v. The Provincial Insurance Co.*, 14 U. C. R. 439, the 1st, 2nd, 3rd, and 10th pleas were general; in *Sillem v. Thornton*, 3 E. & B. 868, the 4th and 5th pleas were general; in *Glen v. Lewis*, 8 Ex. 607, the 1st plea was general; in *Baxendale v. Harvey*, 4 H. & N. 445, the 6th and 7th pleas were general. But *Vickers v. Overend*, 7 H. & N. 92, shews that all about the carpenters and painters might have been omitted, and may be rejected now as surplusage. The pleas must be read as they would be on a motion for judgment *non obstante*: *Goldham v. Edwards*, 17 C. B. 141.

*Harrison, Q. C.*, in reply.—The condition says change in the nature of the occupation. The plea is change in the occupation, which is something quite different. If the specific thing said to increase the risk could not in law do so, the untrue inference therefrom alleged cannot help: *Gore Bank v. Eaton*, 27 U. C. R. 332.

ADAM WILSON, J., delivered the judgment of the court.

The condition provides against “any alteration or addition to be made in or to any risk on which any assurance has been effected,” whether by certain specific means, “or in any other manner whatsoever.”

And the pleas allege “that an alteration was made in the risk on the building,” specifying certain means by which the risk was altered.

If the means be rejected as surplusage, the plea, we think, will be sufficient without the means which make the alteration, being stated; because it would contain a direct statement in the very words of the condition, that the risk was altered, the particular means being of no consequence; for the condition applies to an alteration of risk “in any manner whatsoever.”

But we do not think the means stated, by which the alteration of risk has been brought about, can be rejected as surplusage.

The defendants have introduced into their plea greater particularity than they need have done, but having

undertaken to shew how and by what manner the alteration of risk has been made, they must prove such means as alleged, and not any other or different means.

In *Harris v. Mantle* (3 T. R. 307) the declaration charged the breach of covenant to be for not having used the premises in a husbandlike manner, and it added, but on the contrary, defendant had committed and suffered waste; and it was held that only acts of waste could be proved under the breach, restricted as it was, but if it had not been restricted, as it need not have been, any unhusbandlike use of the premises might have been shewn: *Martin v. Gilham* (7 A. & E. 540); *Edge v. Pemberton* (12 M. & W. 187). See also many other instances stated in *Arch. Crim. Plg.* 10th ed., 108. The alteration of risk is stated to have been by the plaintiffs having suffered and permitted a change in the occupation of the building, and by the introduction of painters, who worked therein at their trade, and by the plaintiffs having suffered and permitted a change in the occupation of the building number two, which adjoined to building number one, and by the introduction into building number two of carpenters, who worked therein at their trade.

The difficulty is, how can the court say that these different acts did or did not alter the risk?—that is, we presume, increase the risk, for a diminution of risk, though it would be an *alteration*, would scarcely be within the minds of the parties as necessary to be guarded against, especially as *alteration* is in the condition accompanied with the words “or addition,” as a synonyme rather than as a word of different signification.

Whether the change in the *nature* of the occupation—which is the language of the condition—is the same as the change *in the occupation*, which is the language of the plea, is not material to be considered, because the condition provides that “any other means whatsoever,” than those instances which are given in the conditions, shall avoid the policy. The defendants therefore were not bound to confine their allegations to the specified instances given in the conditions.

These expressions may not mean the same thing : *Kuntz v. The Niagara District Fire Insurance Company* (16 C. P. 573).

And if the one means a change of the *person* occupying, and the other means a change by the person in his *manner* of occupying, as by changing the nature of his business carried on in the building, it will not make the plea bad or determine this action. For the question all the while is, can a change in the occupation, whichever way the expression is construed, create an alteration in the risk? And this we think is for the jury, and not for ourselves to determine.

A change of persons may undoubtedly increase the risk, and an alteration in the mode of using the building may increase it also.

In *Hobson v. The Western District Insurance Company* (6 U. C. R. 536) the mere change of occupant was held not to avoid the policy on a condition prohibiting a change of occupation, and *Gould v. The British America Assurance Company* (27 U. C. R. 480) is to the same effect. But that must depend on whether the condition is or is not directed against a change of the occupant. If it is directed against it, the condition must be given effect to, and we do not see why such a condition is not a very reasonable one, nor why it should not be given its fullest effect.

The contract of fire insurance, as distinguished from marine policies, is said to be altogether a personal contract, founded on good faith between the insurer and the assured, and for that reason, among others, not to be assignable. And it is notorious that the person applying for insurance and the person in actual occupation are very carefully considered, and esteemed of the greatest consequence by insurance companies in granting or in continuing their policies.

The case of *Hobson v. The Western Insurance Company* (6 U. C. R. 536) was not referred to in *Kuntz v. The Niagara District Insurance Company* (16 C. P. 573).

We think the plea shews a sufficient reason why the risk

may be said to have been altered, contrary to the terms of the condition.

If the pleas be sufficient as to the allegation, it is of no consequence that the other three modes by which the risk is said to have been altered cannot be sustained, because enough will be alleged, we think, and if supported by testimony proved, to maintain the pleas.

A mere temporary introduction of painters and carpenters will, on the authorities and on the reasonable construction to be given to such contracts, be found not to invalidate the policy. We are not satisfied the pleas are sufficient in this respect. It seems an attempt to prevent repairs of the most necessary and reasonable kind, unless an extra premium be paid for the privilege of repairing.

It may be safer for the plaintiffs to reply specially the facts as to the change of occupancy, and as to the painters and carpenters being in the building—whether they were there temporarily and for the purpose of repairing, or under what other circumstances they were there—that the court may know the facts, and may be able to determine whether the risk has been altered or added to.

We think the defendants are entitled to judgment on demurrer, because the change of occupation may have altered the risk, and is a matter which we think is capable of altering or increasing it. And we incline to think the defendants are entitled also to judgment on demurrer as to the other circumstances which they state have altered the risk, because the court cannot know judicially whether such circumstances could or could not have that effect; and that the plaintiffs, if they desire to shew the special facts, such as a short or temporary use of premises by the painters and carpenters, as for repairs or otherwise, should be allowed to apply to do so, when the court could more satisfactorily pronounce an opinion with a full knowledge of facts.

*Judgment for defendants.*

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MARKLE V. THE NIAGARA DISTRICT MUTUAL FIRE  
INSURANCE COMPANY.*Insurance—Condition as to Incumbrances—Construction.*

One of the conditions of an insurance policy was, that persons sustaining loss should declare on oath whether any, and what other, insurance or incumbrance had been made on the insured property. The notice given said nothing about incumbrances, and a mortgage was proved, made by the plaintiff *about a month before the policy*.

*Held*, that though this mortgage was not within the condition, yet the plaintiff could not recover, for he had not complied with the condition, which required him to declare whether there was or was not any incumbrance, and such compliance was a condition precedent to his right to recover.

DECLARATION on a policy, dated 24th August, 1865, to recover the amount of insurance on loss by fire.

Plea.—That the plaintiff did not, within thirty days after loss, deliver in a particular account of loss or damage, signed by his own hand and verified by his oath or affirmation, and by his books of account and other proper vouchers, and did not declare on oath whether any, and what other, insurance or incumbrance had been made on the insured property.—Issue.

The cause was tried at Stratford, last spring, before Richards, C. J.

The notice given by the plaintiff of his loss, and the affidavit he made, did not state whether any and what other incumbrance had been made on the insured property.

A mortgage was proved to have been made by the plaintiff on the property in question, on the 19th July, 1865, for \$500, and to have been still unpaid at the time of the trial.

The condition referred to in the plea, and endorsed on the policy, was as follows: "All persons insured with this Company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the Company, and within thirty days after said loss to deliver in a particular account of such loss or damage, signed by their own hand, and verified by their oath or affirmation, and by their books of

account and other proper vouchers; they shall also declare on oath whether any, and what other, insurance or incumbrance, has been made on the said property. If there be any fraud or false swearing, the claimant shall forfeit all claims by virtue of this policy."

There was a verdict for the plaintiff, for \$856, with leave to defendants to move to enter a nonsuit, on the ground that the notices and affidavit were insufficient to prove the issue.

*McMichael* obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered pursuant to leave, or for a new trial, on the ground that the verdict was against law and evidence, and for misdirection of the learned Chief Justice, in ruling that the plea was not proved, when it was proved,—a mortgage having been shewn to be on the premises, and in force, whereon the buildings insured were erected, and no notice of the mortgage was given to defendants within thirty days after the loss by fire.

*Robert Smith* shewed cause. Defendants are not in a position to take the exception as to the incumbrance, as they should have pleaded there was an incumbrance on the property: *Carter v. Niagara District Mutual Fire Insurance Company*, 19 C. P. 143; *Greaves v. Niagara District Mutual Fire Insurance Company*, 25 U. C. R. 127; *Scott v. Niagara District Mutual Fire Insurance Company*, 25 U. C. R. 119; *Banting v. Niagara District Mutual Fire Insurance Company*, 25 U. C. R. 431; *Mulvey v. Gore District Mutual Fire Insurance Company*, 25 U. C. R. 424. The giving notice of incumbrances is not a condition precedent to the right to sue: *Cinquemars v. The Equitable Insurance Company*, 15 U. C. R. 148; *Consol. Stat. U. C. ch. 52, secs. 68, 69, 70, 71, 78*; *Lampkin v. The Ontario Marine and Fire Insurance Company*, 12 U. C. R. 578. The statute provides that after notice of loss has been sent in, the directors shall ascertain and determine the amount of loss sustained; sec. 68. The directors did so

without calling for further information. It must therefore be assumed they were satisfied with the information which had been submitted to them, and that their refusal to pay was a wilful, unjustifiable refusal.

*M. C. Cameron, Q. C.*, supported the rule. The plea was not proved as to encumbrances, and the mortgage was proved at the trial for the mere purpose of shewing that the property was actually incumbered. The condition is absolute, that the insured shall state whether any and what incumbrances have been made. If there have been none, it must be so stated. Here nothing was said about them, and compliance with the condition is a condition precedent to the right to recover.

ADAM WILSON, J.—The plea states the condition to be, that persons sustaining loss are to declare on oath whether any, and what, insurance or incumbrance has been made on the property; and that the plaintiff did not do this.

The defendants shewed there was a mortgage in fact on the property when the insurance was effected. If they had been obliged to do so, an antecedent mortgage would not have been within the condition, because the notice is what encumbrance *has* been made. The Insurance Act fully protects the company from all prior mortgages; and this condition extends to subsequent encumbrances.

But the defendants contend that they were not obliged to prove an encumbrance in fact. It was necessary the plaintiff should prove, as a precedent act to his recovering, that he had performed all he had engaged to do; and he was obliged to shew he had given a notice not only of any encumbrance on the property, whether made before or after the date of the policy, if one had been made, but to shew he had given a notice even if no encumbrance had been made, stating the fact that no encumbrance had been made: that in any case of loss the notice should refer to the subject of encumbrance, and whether there were any such or not on the premises, and should state how the fact was—

encumbered or not encumbered; and because this had not been done, the case was not proved.

The notice certainly made no mention whether the premises were encumbered or not, and in this respect it was defective; and as it was a condition precedent on the part of the plaintiff, he has failed to shew performance on his part: *Worsley v. Wood* (6 T. R. 710); *Mason v. Harvey* (8 Ex. 819); *Roper v. Lendon* (1 El. & El. 825).

The rule will therefore be absolute to enter a nonsuit.

RICHARDS, C. J.—I concur in this judgment with doubt, but I do not feel sufficiently strong in my own view to dissent.

MORRISON, J., concurred.

*Rule absolute.*

## THE GREAT WESTERN RAILWAY COMPANY v. MCEWAN.

### *Replevin—Goods in possession of third person.*

To an action of trespass for taking goods, defendant justified, as sheriff, under a writ of replevin at the suit of one H. against P., alleging that he entered plaintiff's freight house, where the goods were, the outer door being open, and replevied the goods to H., the same then being in the plaintiffs' possession as bailees and agents only of P., who unjustly detained them from H.

*Held*, no defence; for the plea did not bring defendant within secs. 9 & 10 of the Replevin Act, and in replevin against one person goods cannot be taken out of the peaceable possession of another without notice or demand.

REPLEVIN for several cases of wine, &c.

Plea. That before the alleged conversion, Moses E. Hart, on the 3rd of September, 1867, sued out of the Court of Queen's Bench, at Toronto, a writ of replevin, directed to the sheriff of the County of Essex, whereby the Queen commanded the said sheriff that without delay he should cause to be replevied to Moses E. Hart, his goods, chattels,



and personal property following, that is to say, &c., (describing the goods as in the declaration), which the said Moses E. Hart alleged to be of the value of \$600, and which one Hector Pacaud had taken and unjustly detained, as it is said, in order that the said Moses E. Hart should have his just remedy in that behalf; and that the said sheriff should summon the said Hector Pacaud to appear to the said writ in the said Court of Queen's Bench, at Toronto, within eight days after service of a copy of the said writ upon the said Hector Pacaud, to answer to the said Moses E. Hart in a plea of taking and unjustly detaining his goods and chattels and personal property aforesaid; and what he should do in the premises he should make appear to the said court on the day and at the place aforesaid; which said writ was duly endorsed with a direction to the said sheriff that he should execute the said writ as he was therein commanded; and the said writ, so endorsed as aforesaid, was then delivered to the defendant, as and being the sheriff of the said County of Essex, to be executed; and thereupon the defendant, as and being such sheriff as aforesaid, by virtue of the said writ, and in his bailiwick, entered the depot or freight house of the plaintiffs at the town of Windsor, the outer doors thereof being then open, in order to replevy, and did then replevy to the said Moses E. Hart the said goods, chattels, and personal property of the said Moses E. Hart, the same being then in the said depot or freight house of the plaintiffs, and in charge and custody of the plaintiffs as bailees and agents only of the said Hector Pacaud, who wrongfully detained the same from the said Moses E. Hart, which said replevy by the defendant is the conversion alleged.

There were subsequent pleadings, which it is unnecessary to set out, as the judgment proceeds upon the plea only.

*Irving*, Q. C., for the plaintiffs, cited *Carveth v. Greenwood*, 3 P. R. 175; *Anderson v. McEwan*, 8 C. P. 532.

*Blevins*, for the defendant.

MORRISON, J., delivered the judgment of the court.

The plaintiffs charge the defendant with having committed a trespass in taking their goods, and the defendant answers—"I, as sheriff, was commanded by a writ of replevin to replevy to one Hart certain goods, being the property in question, which goods one Pacaud had taken and unlawfully detained, &c. ; and by virtue of the writ I entered the freight house of the plaintiffs, the outer doors being open, in order to replevy and did then replevy to said Hart the said goods, the same being then in the freight house of the plaintiffs as bailees and agents only of Pacaud, who improperly detained them from Hart ; which said replevy is the conversion complained of," &c.

The first question to be determined on the pleadings is, whether the defendant by his plea has shewn a good answer to this action, for if the plea is bad there is no necessity to consider the subsequent pleadings demurred to.

Our act, Consol. Stat. U. C. ch. 29, has extended the remedy by replevin beyond that given by the law of England, one of the objects being to enable persons who were entitled to maintain an action of trespass or trover for property unlawfully taken or detained, to obtain possession, upon giving security, until the right of property was determined in an action, (the prosecution of which was also secured,) no doubt with a view of preventing persons who wrongfully obtained property from disposing of it and defrauding the true owner, securing to the claimant the property, instead of the previous remedy by an action in detainee for damages, in which a recovery might be fruitless.

Under the 9th and 10th sections of the act, the sheriff is authorized to replevy the goods out of the possession of third persons not named in the writ of replevin, under certain circumstances : that is, in case the property to be replevied be secured or concealed in the dwelling house or other building of another person, or concealed on the person or premises of another, such other person holding the same for the defendant in replevin. The sheriff in such

case, after demand upon such person and refusal, may search and examine the person and premises of the other person for the purpose of replevying such property, and shall replevy according to the writ.

Now in order to justify the taking of the goods in question from the plaintiffs, the defendant, in our judgment, must bring himself within the provisions of either of these sections, for we do not think that it was the intention of the legislature, or that the statute contemplates, that a party plaintiff in replevin could sue out a writ of replevin against A. to replevy goods in A's possession, and alleged to be taken or detained by A., and under it replevy goods in the lawful and peaceful possession of B.

The plea does not shew that the goods were secreted or concealed in the freight house of the plaintiffs, or that the plaintiffs were holding them under these circumstances for Pacaud, he having unlawfully taken or detained them. It does not allege any demand on the plaintiffs by Hart or by the defendant before taking them, the plea merely stating that the defendant entered and took the goods out of the freight house of the plaintiffs, the outer doors being open, averring that the plaintiffs were bailees and agents of Pacaud. There is no allegation that the plaintiffs knew or had notice that the goods were Hart's, or that Pacaud had unlawfully taken them, nor does it appear in any way that the plaintiffs were wrong-doers, while, on the other hand, the plea shews that the goods were in the lawful and peaceable possession of the plaintiffs.

No authority was cited, nor can we find any, to support the general contention of the defendant, that in replevin against A., who is charged with having taken and detained the goods of C., C. can replevy the goods out of the peaceable possession of B. In the absence of authority, on principle we cannot see that the plea here shews any justification. The averment that the plaintiffs held the goods as bailees or agents of the defendant in replevin (Pacaud), does not, in our opinion, assist the plea; it rather goes to defeat it, as it shews that the plaintiffs were in peaceable possession of the goods.

If Hart, the plaintiff in replevin, is the true owner of the goods, the plaintiffs here, after a demand and refusal to deliver them to Hart, might be liable to him in replevin or trover; but in that case the plaintiffs would have the protection of the replevin bond, or an opportunity of deciding what course to pursue, either to resist the action or to interplead. But if the plaintiffs can be deprived of their possession of the goods in this manner, under an *ex parte* proceeding against another, they are rendered liable to an action at the suit of their bailor, driven to dispute his title to them, without perhaps any grounds for doing so, or probably any knowledge of the adverse claimant or his title to the goods, or the circumstances under which the plaintiff's bailor obtained possession of them.

As said by Draper, C.J., in *Anderson v. McEwan* (8 C. P. 535): "It might lead to gross injustice if the sheriff could take goods out of the possession of a party not named in the writ of replevin, and whom he is not directed to summon to appear and defend. Nor could such a party, so far as I can see, intervene or appear and defend the action, while the person named as defendant in the writ of replevin might, by collusion with the plaintiff, let judgment go by default."

Coleridge, J., in *Mennie v. Blake* (6 E. & B. at p. 850) says, in referring to the law of replevin in England:—"If, wherever a party asserts a right to goods in the peaceable possession of another, he has an election to take them from him by a replevin, it is obvious that the most crying injustice might not unfrequently result." How much stronger would have been the language of that learned judge, if he was referring to a case where the goods, without any demand or notice, were taken out of the peaceable possession of a stranger to the replevin suit, and without the protection that the security in replevin gives the defendant therein.

It seems to us to be irreconcilable with all principle that A., by issuing a writ of replevin against B., can by the sheriff come into my house, and without any notice or



demand replevy to A. goods of which I have lawful and peaceable possession ; thus dispossessing me of goods held as my own, or as bailee, and depriving me of that protection by security which the writ of replevin gives, and of my right to interplead or defend my title to the property.

We are of opinion that the plaintiffs are entitled to the judgment.

*Judgment for plaintiffs.*

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IN RE HALL V. CURTAIN, IN THE DIVISION COURT.

*Division court—Unsettled account—Jurisdiction.*

The plaintiff in a Division Court may recover \$100, being the balance of an unsettled account not exceeding \$200, but when the whole account exceeds that sum there is no jurisdiction.

An unsettled account means an account the amount of which has not been adjusted, determined, or admitted by some act of the parties.

The plaintiff here sued for \$84, being the balance due for rent of premises occupied by defendant as his tenant for several years, at \$160 a year, after deducting the payments made from time to time.

*Held*, not within the jurisdiction.

*Kerr*, in Michaelmas Term, obtained a rule calling on the judge of the county court and John Curtain to shew cause why a writ of mandamus should not issue, commanding the judge to proceed with the trial of a certain action brought in the first division court of the County of Peterborough, in which Hall was plaintiff and Curtain defendant, on the grounds—1. That the judge erroneously refused to try the action on the ground of want of jurisdiction, because evidence was offered of an unsettled account which originally exceeded \$200, said to have been reduced by payment. 2. That the action is a proper one to be tried in the said court. 3. That the jurisdiction of the said court extends to the case of an unsettled account which originally exceeded \$200, but which had been reduced by payment to a sum under \$200. 4. That the said action was brought in respect of a balance, claiming on an unsettled account under \$200 ; and why the said judge should not pay the costs of the application.

The application was based on an affidavit, which stated that the suit was brought in the division court: that the particulars of demand in the summons was as follows:

JOHN CURTAIN,

To WILLIAM HALL, *Dr.*

To balance due for rent of premises on Hunter Street, Peterborough, from 1st August, 1864, to 21st January, 1868, after applying payments made on account.....	\$82 23
Interest from 26th January, 1868.....	2 46
	<hr/>
	\$84 69

The defendant notified the plaintiff that he claimed to set off \$62 for erecting a stable on the premises in question, and for certain repairs on the same.

The case came on for trial on the 8th of August, 1868, when both parties appeared.

The plaintiff, in order to establish his claim, offered evidence to the effect that the defendant occupied certain premises, as tenant of the plaintiff, at a rent of \$160 a-year, from the 1st of January, 1860, to the 20th of January, 1868: that he made payments on account of the rent at various times, leaving the balance claimed due to the plaintiff.

The learned judge refused to proceed further, stating as his reason, that evidence was offered of a claim or account unsettled which originally exceeded \$200, and therefore he had no jurisdiction—the plaintiff contending that the account was not an unsettled account within the meaning of the 59th section of the Division Courts Act.

The learned judge then endorsed on the summons the following memorandum: "Refused to go into case because evidence offered of an account unsettled, amounting to \$640, said to be reduced by payment." The plaintiff afterwards applied for a new trial, which the learned judge refused to grant, retaining the opinion he had expressed at the trial.

The plaintiff in his affidavit stated that the defendant rented the premises, as already mentioned: that he paid at different times \$473.31, the last payment of \$50 being paid on the 17th of December, 1867; and that since the 20th January, 1868, he was indebted to him in the unpaid

balance of \$82.23, and that all the payments the plaintiff gave credit for were made expressly on account of the rent. The learned judge filed an affidavit, stating that the plaintiff's counsel stated at the trial that for the purpose of proving his claim he had to shew the whole amount of rent that became due during the whole period.

During this term *J. A. Boyd* shewed cause. The plaintiff in the suit has another remedy, by suit in the county court, and a mandamus therefore will not be granted; besides which, the judge has in fact considered and determined the case: *Allen v. Turner*, 2 Dowl. N. S. 24; *Rex v. Marquis of Conyngham*, 1 D. & R. 529; *Walker v. Biggar*, 4 U. C. R. 497; *Kernot v. Bailey*, 4 W. R. 608; *Ex parte Smyth*, 1 Har. & Wol. 128; *In re Corbett*, 4 H. & N. 452; *Ex parte Milner*, 15 Jur. 1037; *Brown v. Cocking*, L. R. 3 Q. B. 672; *Williamson v. Bryans*, 12 C. P. 275. But admitting that a mandamus will lie, it cannot be granted here, for the judge was right. Under the Division Courts Act, Consol. Stat. U. C. ch. 19, sec. 55, these courts have jurisdiction in all cases of debt, &c., "where the amount or balance claimed does not exceed \$100;" but this provision is restrained by sec. 59 [see this section set out in the judgment] to cases in which the whole account, of which the balance is claimed, does not exceed \$200, which in this case it did. If specific payments have been made of specific items, those items might perhaps be treated as struck out of the account, so as to form no part of it: *Mearns v. Gilbertson*, 6 O. S. 577; but that was not shewn here. *Miron v. McCabe*, 4 P. R. 171, seems to be the latest case in which the question has arisen, but *McMurtry v. Munro*, 14 U. C. R. 166; *Higginbotham v. Moore*, 21 U. C. R. 329; *In re The Judge of the County Court of Northumberland and Durham*, 19 C. P. 301; and *Waugh v. Conway*, 4 U. C. L. L. J. N. S. 228; are in conflict with that decision, which was in chambers. The term, "unsettled account," is a term well known in the law, as being the converse of an account stated: *Neil*

v. *Neil*, 15 Grant 110; *Llewellyn v. Llewellyn*, 15 L. J. N. S. Q. B. 4; *O'Connor v. Spaight*, 1 Sch. & Lef. 308; *Tomlins' Law Dic.* "Account."

*Kerr*, contra.—The argument that there is another remedy by suit in the county court does not apply. What the plaintiff claims is his right to have the case tried in the division court, and for that right a suit in the county court is no remedy; nor is there other means by which he can enforce his right. Here the learned judge refused to entertain the case at all, and the plaintiff was debarred therefore from shewing payments made in discharge of specific items, or that the account was not unsettled, within the meaning of the act. Sec. 55 clearly gives jurisdiction, and its operation is not confined by sec. 59, which is intended only to provide against the splitting of demands. This last clause is similar to that in the English Act, 9 & 10 Vic. ch. 95, which is commented upon in *Avards and Rhodes*, 8 Ex. 312. He cited also *Turner v. Berry*, 5 Ex. 858; *Walker v. Watson*, 8 Bing. 414; *Furnival v. Saunders*, 26 U. C. R. 119; *Cameron v. Thompson*, 1 U. C. L. J. 9; *Halford v. Hunt*, 2 U. C. L. J. 39; *Kimpton v. Willey*, 1 L. M. & P. 280; *Wallbridge v. Brown*, 18 U. C. R. 158.

MORRISON, J.—By the 55th section of the Division Courts Act the judge of any division court may hold plea of, and may hear and determine, &c., all claims and demands of debt, &c., where the amount or balance claimed does not exceed \$100. By the 59th section it is enacted "A cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a division court, and no greater sum than \$100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds \$200."

If the 55th section stood alone, the judge would have jurisdiction in every case where the balance claimed did not exceed \$100. The applicant's counsel contended that



such was the meaning of the whole act, and that the intention of the 59th section was not to limit the jurisdiction, but merely to prevent the splitting of suits. I cannot adopt that view, for I think it is quite clear that the legislature intended to limit the jurisdiction first to a balance of \$100 in the case of an unsettled account above that sum, and then it declared that even in cases where such balance was claimed the plaintiff could not sustain his action in that court if the unsettled account exceeded \$200: in other words, a party may recover in that court as high as \$100, being the balance of an unsettled account not exceeding \$200, but where the balance claimed is of an account unsettled and exceeding the sum of \$200, he cannot sustain his action for any balance in that case, while, on the other hand, he may recover \$100 being the balance of any settled account between the parties to, any amount.

What is meant by an unsettled account does not appear very clear, but I think the reasonable interpretation is, an account the amount of which is not adjusted, determined, or admitted by some act of the parties, such as by the giving of a note, a mutual stating or balancing of the account, or fixing the amount due.

In the case we are considering the particulars of claim endorsed on the summons are for a balance *primâ facie* which the plaintiff was entitled to sue for and recover, and within the jurisdiction, viz., \$84.69, a balance due for rent after applying payments. Such particulars might refer to an unsettled account under \$200, and it is only when the case comes on for trial that the difficulty arises. The plaintiff then says, "I claim this \$84.69 as the balance of three years five months and twenty-one days' rent, due on certain premises rented by the defendant at \$160 a year, payable monthly;" and in order to establish his claim he states to the judge that he must first prove the tenancy, and that the defendant was indebted to him, the plaintiff, in about \$600, and that he intended reducing that amount by payments to less than \$100.

Why the plaintiff was compelled to adopt this mode of proof upon his own case one cannot readily see. If the tenancy was admitted by the defendant, and the payments made during the three years were payments made on account of the rent, all that the plaintiff had to do was to sue for the last say seven months' rent; but if the matter in dispute was either the amount of rent payable or the duration of the term, and either of these facts had to be investigated and determined before the balance could be struck, in such a case the judge, I think, would be trying a case beyond the jurisdiction—viz., to recover a balance due of an unsettled account over \$200; and we must assume such to be the case here, for neither at the trial nor upon the application for a new trial does it appear that the plaintiff rested his case upon the ground that the balance was due on an account at any time settled or stated between the parties.

And upon this application the plaintiff has not shewn that the account is not an unsettled one, and, for all that appears, the amount of the annual rent, as well as the time charged for, were both in dispute. It was the duty of the plaintiff, when the matter was before the court below, both at the trial and upon the motion for a new trial, as well as on this application, to have shewn that the case was one clearly within the jurisdiction of the learned county court judge, and not to leave him or this court to conjecture what kind of a case the plaintiff intended to make out in the division court.

On the whole, as the case appears before us, we think that the learned judge was right in the conclusion he arrived at—viz., that the action was brought to recover the balance of an unsettled account which in the whole exceeded \$200, and that the rule should be discharged, as moved, with costs.

ADAM WILSON, J.—As *Miron v. McCabe*, (4 P. R. 171) which I decided in chambers, has been referred to, it is proper I should say that on examining again the sections of the

Division Courts Act, I am quite satisfied that by the direct language of the 59th section no action for the balance of an account can be brought in the division court, "where the unsettled account in the whole exceeds two hundred dollars."

This section was not sufficiently in my mind when I decided that case. The decision was not warranted by the statute, because the unsettled account in the whole was \$236.55. The sooner it is expressly over-ruled the better. The judge of the county court of Wentworth, in *Waugh v. Conway* (4 U. C. L. J. N. S. 228), and the junior judge of Northumberland, in a case which was shewn to me on my last circuit, and which has since been properly affirmed in the Common Pleas, (19 C. P. 301) have already pointed out the objection to it.

I quite agree with the opinion expressed in this case, and that *Miron v. McCabe* was wrongly decided.

RICHARDS, C. J., concurred.

*Rule discharged.*

## CHURCHER, ASSIGNEE, v. COUSINS.

*Insolvent Act of 1864—Appointment of Assignee—Security by him—Fraudulent preference and payment—Sec. 8, sub-secs. 4, 5.*

*Held*, that the London Board of Trade, which was an organized body in operation before the Insolvent Act of 1864, had power, though not incorporated, to appoint official assignees under that act; and that such appointment was properly made by resolution.

The transmission of a copy of such resolution to the clerk of the county court, under sec. 4, is directory only; and the omission to send it will not invalidate the appointment.

A bond to W. S., of, &c., President of the Board of Trade of the city of London, to be paid to him as president of the said board, his successors and assigns, and executed by the sureties, but not by the assignee: *Held* sufficient, under sec. 4, sub-sec. 2.

*Quære*, whether a defect in such security, or the absence of it altogether, would avoid the assignee's appointment.

On the 18th October, the insolvent sold goods to one C., taking his note for the price, which on the same day was taken by C., and by the defendant, and one of the insolvents, to a bank, and there left to be applied in payment of notes made by the insolvents and endorsed by defendant. On the 20th the insolvents made a voluntary assignment, being pressed to do so by threats of compulsory liquidation.

*Held*, that the transaction, being within 30 days before the assignment, was a transfer to defendant by way of payment, giving him an unjust preference, and therefore void under sec. 8, sub-sec 1; that there was evidence also that it was made by the insolvents when unable to pay, with a person knowing such inability, and therefore made with intent to defraud their creditors; and that it was also a payment to defendant under sub-sec. 5.

*Held* also, *Morrison, J.*, doubting, that under sub-secs. 4 and 5, the assignee might recover in trover for the goods sold, though before his title accrued the note had been discounted and the proceeds applied on defendant's endorsements.

THE declaration contained five counts, but the fourth and fifth are alone material, as the plaintiff failed on the first three. The fourth count was in trover, and the fifth was the common count.

Pleas: To the fourth count, not guilty. To the fifth count, never indebted, and payment. To the whole declaration, that the plaintiff was not the assignee in insolvency as alleged, and that W. Platt and F. Platt, the insolvents, did not duly make and execute to the plaintiff an assignment under the Insolvent Act of 1864, as alleged. Issue.

The case was tried at the last spring assizes held at London, before Richards, C. J.

The material facts were as follows:—



The insolvents executed an assignment to the plaintiff, as official assignee, on the 20th October, 1866.

The insolvents and official assignee lived in London, where the assignment was made and filed.

The plaintiff acted as an official assignee by appointment of the London Board of Trade. He was first appointed on the 9th of August, 1864, for the county of Middlesex, and was required to furnish security to the amount of not less than \$5000.

The London Board of Trade was not then incorporated, and was not incorporated until the 15th of August, 1866, by authority of the 29-30 Vic. ch. 76. It was first established on the 22nd April, 1857.

The plaintiff was, on the 8th of March, 1867, appointed by the Board of Trade of London, under the following resolution :—

“That in order to prevent any doubt as to the validity of the appointment of assignees before the Board of Trade was incorporated by Act of Parliament, the appointment of the following persons as assignees under the Insolvent Act of 1864, already made by the board, are hereby severally confirmed and established :—Messrs. Thomas Churcher,” &c.

The plaintiff was not appointed assignee by the creditors of these insolvents.

On the 30th August, 1866, he procured a bond to be executed by thirteen persons, in £100 each, to “Walter Stinson, of the city of London, president of the Board of Trade of the city of London, to be paid to him as president of the said Board of Trade, his successors and assigns,” for the benefit of the creditors of any person whose estate is or may be in process of liquidation under the Insolvent Act of 1864. And on the 9th of April, 1867, the plaintiff and thirteen others, gave another bond—the plaintiff in the sum of \$5000, and the other thirteen in \$400 each, to “the president of the London Board of Trade, to be paid to the said president of the London Board of Trade, or his successors in office.”

The clerk of the county court of Middlesex was notified in writing, on the 3rd of September, 1866, that the plaintiff was appointed by the Board of Trade an official assignee, by resolution of the board in August, 1864. And he was also notified in writing, on the 9th of April, 1867, of the plaintiff's appointment in August, 1864, being confirmed and established by the board, on the 8th of March, 1867; and that the plaintiff, as official assignee, had renewed his bond to the president of the Board of Trade, in the sum of \$5000.

The plaintiff was not appointed by by-law of the board, or by instrument under seal, but by resolution of the board in writing only.

The resolution of August, 1866, appointing the plaintiff assignee, was not filed; a notice of it was filed on the 3rd of September, 1866.

On the 18th October, 1866, the insolvents sold a quantity of lumber to Alexander Campbell, for \$300.67, for which Campbell gave his note.

This note was, on the same or the next day, taken by Campbell and the defendant, and one of the insolvents, to the Bank of British North America in London, and there left with the manager to be applied in payment of a note in the bank, for \$130, made by the insolvents, and endorsed by defendant, and the balance on another note for \$550, made by the insolvents, and endorsed by defendant and Campbell.

For about two days before the assignment of the 20th of October, the insolvents were pressed to make a voluntary assignment, and they consented at last to do so, on being told if they did not do so means would be taken to secure a compulsory liquidation. The plaintiff, about the 22nd of November, 1866, demanded from the defendant some money for lumber and other articles; he refused to give it up.

It was contended by the defendant's counsel, at the trial, that the trover count was not sustained: that the conversion, if any, took place before the assignment was made to the

plaintiff, and the conversion complained of is not stated as an act against the insolvents, but as against the plaintiff himself: that the ordinary count was not applicable, the plaintiff should have declared specially, setting out that the transaction was one fraudulent as against creditors: that the count for money had and received was not proved: there was no money had and received for the plaintiff; the plaintiff should have declared specially, setting out his title to the money by reason of the conduct of the defendant and the insolvents being contrary to the Insolvent Act: that if the money was claimed as a payment made by the insolvents within thirty days of their insolvency, it should have been proved the Platts were insolvent, and that the defendant knew it.

There was a verdict for the plaintiff, and \$300.67 damages.

In Easter term last, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved at the trial, or why a new trial should not be had, the verdict being contrary to law and evidence, and for misdirection, which misdirection consisted in the learned Chief Justice telling the jury that the plaintiff was entitled to recover on the fourth or fifth counts, though not entitled to recover under the first, second, and third counts, whereas the evidence shewed there was no conversion of goods by the defendant after the insolvency of the Platts, but the matter relied on was a delivery by the said Platts to the defendant before his insolvency, and the note so delivered was used in retiring a note of the said Platts then held by the Bank of British North America, and the moneys received were received from the said Platts by the defendant before the insolvency; and also in directing the jury that the plaintiff was, at the time of bringing this action, a duly appointed assignee of the said Platts.

*Harrison*, Q. C., shewed cause, The plaintiff was duly appointed an official assignee in July and August, 1866, by resolution of the London Board of Trade before it

was incorporated : *Newton v. Ontario Bank*, 15 Grant, 283. The statute does not say how or by what instrument the appointment shall be made : Insolvent Act, 1864, sec. 4. The giving security by the assignee is only directory : sec. 4, sub-secs. 2, 6 ; and the plaintiff must first be an assignee before he can give security as such. The statute does not say what kind of security shall be given. The bond given by the plaintiff on the 30th of August, 1866, by thirteen persons, though he himself was no party to it, was proper security under the statute. The security last mentioned was rightly given in this case to the president of the Board of Trade, in his name of office, according to sec. 4, sub-sec. 2, by being given to "Walter Stinson, president of the Board of Trade, to be paid to him as president."

The delivery of the promissory note by the insolvents to the defendant was by way of preference against the other creditors. Such delivery was either as a gift or a payment, and in either case void : *Nunes v. Carter*, L. R. 1 P. C. 342. The plaintiff is entitled to recover in trover, for the delivery of the note was contrary to sec. 3, sub-sec. (c). and the plaintiff has all the rights the insolvents had : *Cooper v. Chitty*, 1 Sm. L. C. 435, 6th ed. ; *Carlisle v. Garland*, 7 Bing. 298, 10 Bing. 452, 13 M. & W. 152, 4 Cl. & Fin. 693 ; *Dillon v. Langley*, 2 B. & Ad. 131. The plaintiff is also entitled to sue on the common counts : *Simpson v. Sikes*, 6 M. & S. 295 ; *Young v. Marshall*, 8 Bing. 43, 2 Arch. Bankrupt Law, 861-2.

*M. C. Cameron*, Q. C., supported the rule. The plaintiff never was a legal assignee, because the Board of Trade was not incorporated when he was appointed ; because the plaintiff did not give the security to the president in his official name, but to the individual who filled the office of president at the time ; and because the Board of Trade should have fixed in the article of nomination the character of the security to be given, and the amount of it. The sub-sections of section 8, of the Insolvent Act of 1864, are those that apply to the merits of this case, if any of the



provisions are applicable at all. If the case be said to be within sub-sec. 4, the first question is, was the defendant a creditor of the insolvents; he had then no claim against them. Then what is the meaning of "*In contemplation of insolvency*?" If it means that the debtor intends to take advantage of the Insolvent Act, that was not proved here. The plaintiff can exercise only those rights which the insolvent had at the date of the assignment, and at that time the note was in the possession of the bank: the demand should have been made of the bank. Money had and received will not lie, for there was no money received in that sense. Cousins discounted the note, and he and Campbell both received the same benefit. He referred to *Newton v. The Ontario Bank*, 13 Grant, 652; S. C. in Appeal, 15 Grant, 283; *Newnham v. Stevenson*, 15 Jur. 360.

ADAM WILSON, J.—We are of opinion the London Board of Trade, which was an organized body in operation many years before the Insolvent Act of 1864 was passed, and which continued so at the passing of that act, and, at the time when the plaintiff's appointment as official assignee was made, on the 9th of August, 1864, had full authority to appoint official assignees, although it was not then an incorporated association: *Newton v. The Ontario Bank* (15 Grant, 283).

We are also of opinion the appointment was valid by resolution, for that is the very expression in the fourth section of the act.

The Board was not incorporated when the appointment was made, and had therefore no common seal.

A by-law is, however, in pleading always described as a rule order, and ordinance, and never as a by-law: per E. V. Williams *arguendo* in *Hopkins v. Mayor of Swansea* (4 M. & W. 633), and per Alderson B., and Abinger, C. B., p. 630, "Any rule or ordinance which the corporation is empowered at common law to make, is a by-law."

It is no part of the definition of a by-law that it must

be under seal. In the case just referred to it was not under seal, nor was it under seal in the precedent in *Chitty* on Pleading, vol. ii., 6th ed., p. 260, in which debt was brought on a by-law by the Royal College of Surgeons incorporated by charter, for an annual sum payable by a member of the body. And other bodies besides incorporations may pass by-laws, as parishioners of a parish, the commoners of a common: *Grant* on Corporations, 76, note *k*. When the by-law is in the nature of a contract, it must be under seal to be binding on the corporation: *Mayor of Ludlow v. Charlton* (6 M. & W. 815).

When the act of parliament requires the by-laws to be under seal, as in *Dunston v. The Imperial Gas Co.* (3 B. & Ad. 125,) or as our municipal act does, there can be no question about the necessity for it.

We think the transmission of a copy of the resolution to the clerk of the county court was directory only. No doubt a copy should have been sent instead of a notice of it, by the 4th section of the act.

We are of opinion also that the bond to "W. S., president of the Board of Trade, to be paid to him as President of the Board of Trade, his successors and assigns" is a security taken "in the name of office of the president of such Board of Trade," according to section 4, sub-section 2.

It is like the case of *The Master, Fellows, and Scholars of Sussex and Sidney College v. Davenport*, (1 Wils. 184) where the bond, instead of being given to the master, &c., was to *Doctor Craven*, (who was in fact the master) *Fellows*, &c., but it was made payable to *the master*, &c.; and the court said, "There is no question but the bond being to *Doctor Craven*, &c., *solvendum* to the master, fellows, and scholars, is a bond to them in their corporate capacity; and the duty is to the master, fellows, and scholars."

And we are of opinion the bond that was given was sufficient, though the plaintiff was no party to it. The statute does not specify what kind of instrument shall be given as security, and we think the plaintiff does give security when he procures thirteen persons to execute a bond for him, and delivers such bond to the Board of Trade.

We should probably have come to the conclusion that the whole of these matters were directory only, though the statute says the security shall be given by the assignees before entering on the performance of their duties, because the creditors can, by sec. 4, sub-sec. 6, require the assignee to give such security as they shall direct, and because it would be a most disastrous thing for creditors and debtors also, if all their rights as settled and determined in insolvency could be vacated from end to end because there was some technical defect in the assignee's security, or because he had given no security at all, or had not sent the clerk of the county court a copy of the resolution by which he was appointed.

The whole of the technical objections fail.

Upon the merits, I am of opinion there was evidence from which the jury might properly have inferred that the sale of the lumber by the insolvents to Campbell, on the 18th of October, and the delivery over on the same day by the debtors to the defendant of the note which Campbell gave for the lumber, were transactions made by the insolvents at a time when they were unable to meet their engagements, with persons knowing such inability or having probable cause for believing such inability to exist, under sec. 8, sub-sec. 1, and that the same was therefore made with intent to defraud their creditors.

There was also evidence that the delivery of this note to the defendant was a sale or transfer to him as a creditor (*Crosby v. Crouch*, 11 East, 256; *Van Casteel v. Booker*, 2 Ex. 697; *Bishop v. Crawshay*, 3 B. & C. 415,) by the insolvents by way of payment, whereby he obtained an unjust preference over the other creditors; and that such sale, transfer, or payment, was therefore, by the operation of that section, null and void, and the subject thereof recoverable back by the assignee for the benefit of the estate.

The fact that this took place within thirty days next before the execution of the deed of assignment raised the presumption which that section declares shall be raised, that it was done in contemplation of insolvency.

This presumption, besides the statutable aid in favour of it, was supported by the evidence.

There was also evidence, I think, that the transaction respecting the note constituted a payment made by the insolvents, to the defendant, within the 5th sub-section of the same section, for the note was taken by the parties to the bank and discounted, and the proceeds applied at once in payment of one note in full and the reduction of another note, upon both of which notes the defendant was an indorser for the insolvents. And this was done within thirty days next before the assignment by the debtors, who were unable to meet their engagements in full, to a person knowing such inability or having probable cause for believing the same to exist, in which case the section declares the payment shall be void, and may be recovered back.

But the important preliminary question arises, whether, as the whole of the transaction was completed, the note discounted and proceeds applied, before the plaintiff's title accrued, he can maintain trover or sue for money had and received to his use.

Under the insolvent act the title of the assignee arises. It relates to the time at which the assignment is made, and has no anterior relation, unless in those cases, as in sec. 8, sub-sec. 5, in which the act has expressly declared it shall have a retroactive effect.

All fraudulent preferences or acts done to injure, obstruct or delay creditors, are void; but the fraudulent preference or other impeachable act, must be continuing at the time when the assignee's title accrues, to enable him to question it. If it has been completely closed before his title accrued—that is, before the execution of the deed of assignment—he cannot sue upon it or in respect of it, for his title does not relate back to cover it.

In *Marks v. Feldman* (Weekly Notes of 15th May, 1869,) the debtor being indebted to the defendant and other creditors, voluntarily gave him a bill of sale of his goods, with power to sell. Defendant sold the goods. Nearly a month after that the debtor was adjudged a bankrupt on



his own petition, dated the day of the adjudication, and about a month after the adjudication the plaintiff was appointed assignee.

The plaintiff brought an action as assignee for conversion of the goods, and for money had and received. The court held there was no relation back of the assignee's title in the case of an adjudication on the debtor's own petition: that the bill of sale to defendant was voidable only as a fraudulent preference, and passed the property until the assignee elected to avoid it: that when the defendant sold the goods they were his, and that the money he received for them was money had and received for himself, and not for the plaintiff; and that all having been concluded before the assignee's title accrued, the plaintiff was not entitled to recover.

In this case the note was delivered to defendant, and the proceeds applied by the bank upon the defendant's endorsement for the insolvents before the deed of assignment to the plaintiff was executed, and before therefore his title to the insolvent's estate accrued. So far the plaintiff's remedy is concluded by the case referred to, if it is applicable to it.

The 4th sub-section of the 8th section declares the transaction shall be null and void, and the subject thereof may be recovered back for the benefit of the estate, while the bill of sale in *Marks v. Feldman* was not void, but voidable only at the election of the assignee.

The 4th sub-section plainly gives a power to recover the property back for the benefit of the estate, and this power we must see could be very inadequately exercised if it were confined to those cases only in which the creditor who got the goods still had them in specie in his own possession, for all he would have to do to defeat the assignee would be to transfer the property he had fraudulently got to some one else, and to retain the price or value of it with impunity to his own use, in defiance of the creditors he had wronged.

If the transaction be null and void, any disposal of the

property obtained contrary to the provisions of the statute must be a conversion by him, and a conversion to be sued for by the assignee as assignee, under the proper construction of this section.

The like observations apply expressly to the 5th sub-section. Avoiding antecedent transactions made in contemplation of insolvency, although not made as a fraudulent preference, is not unusual : *Nunes v. Carter* (L. R. 1 P. C. 342.)

Here there was evidence both of a fraudulent preference and of the transaction being done in contemplation of insolvency, under the 4th sub-section, and of the transaction being such as can be avoided under the 5th sub-section.

I think the rule should be discharged.

MORRISON, J.—I concur in the judgment of my brother Wilson as to the technical objections, but I am not satisfied with the conclusion arrived at on the merits.

I confess I have not had time to examine closely into the provisions of the Insolvent Act, and their application to the facts of this case. It is certainly no easy task to put a satisfactory construction on some of the enactments of the statute. It is, however, of little moment, as no matter what my opinion might be, it would not affect the result.

At present I cannot satisfy myself that the proceeds of the promissory note in question being applied by the bank to take up other notes of the insolvent, upon which the defendant was endorser, entitles the plaintiff to recover back from the defendant under the provisions of the 4th sub-section of section 8 of the Insolvent Act, the amount so applied by the bank.

In my opinion the defendant is entitled to judgment.

RICHARDS, C. J., concurred with ADAM WILSON, J.

*Rule discharged.*

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## YEARKE, APPELLANT, AND BINGLEMAN, RESPONDENT.

*Quarter sessions—Perverse verdict—New trial—Mandamus.*

Where a conviction has been affirmed by a jury on appeal to the quarter sessions, that court has no authority to grant a new trial.

*Quære*, whether when such verdict has been rendered against the express direction of the chairman, that court would be bound, or should be compelled by mandamus, to enforce the conviction so affirmed.

ON the 25th May, 1868, at Charlotteville, in the county of Norfolk, Norman Yearke and John Nelson were convicted before John H. Spencer, a justice of the peace, for a trespass on the land of John Bingleman, being lot nine in the sixth concession of Charlotteville, between the first of January and the last day of February, by falling timber from No. 8 upon his land and leaving the tops thereon, also cutting three pine trees of his timber; and he adjudged them for the offence to pay \$10 for compensation to Bingleman, and also the further sum of \$1 cash as penalty, to be paid and applied according to law, and also to pay the said John Bingleman the sum of \$6.75 for his costs; and if the said several sums were not paid before the 1st of June, he ordered the same to be levied by distress and sale of the goods and chattels of Yearke and Nelson, and in default of sufficient distress he ordered them to be imprisoned in the common gaol of the county of Norfolk, to be kept at hard labour, for the space of twenty days, unless the said several sums, and all costs and charges of the said distress and of the commitment and conveying them to gaol, should be sooner paid.

Against this conviction Yearke appealed to the next court of general quarter sessions of the peace, held on the 9th of June.

The matter came on to be heard before the court, and a jury was called and sworn, and the respondent entered on his case. It was proved, on cross-examination of the respondent's first witness, that the land on which the alleged trespass was committed was wholly unenclosed. On this

the appellant's counsel submitted to the court, and the court held, that the conviction was bad on that ground. The respondent's counsel declined to submit to the ruling of the court, and called witnesses to prove the alleged trespasses and the damage done. The appellant's counsel, after the ruling of the court, called no evidence. The respondent's counsel then addressed the jury, and the appellant's counsel stated he would not offer any arguments to the jury, as the court had decided the conviction was bad. The court then charged the jury, that as it was proved the land in question was wholly unenclosed, they should quash the conviction. The jury retired and brought in a verdict for the respondent, with \$15 damages. The court thereupon declined to receive the verdict, and directed the jury that their verdict must be either affirming or quashing the conviction, and as the court had already ruled that the conviction was bad on the grounds stated, it was their duty to quash it. The jury nevertheless rendered their verdict affirming the conviction.

Immediately after the rendering of the verdict, and before any order of the court was made in the premises, the appellant's counsel moved for a new trial, at the same sessions, in presence of the respondent's counsel, which after due consideration was granted by the court, the respondent's counsel protesting against the same and against the power of the court to grant the new trial. On the 12th of June, during the same sittings of the court, the appeal was again called on, when the respondent's counsel declined to appear. After proof of the service of the notice of the appeal and entering into the recognizance required, and after proof given by the appellant that the land was wholly unenclosed, it was ordered by the court that the conviction should be quashed with costs. The costs were taxed by the court at £10 4s. 9d.

A *certiorari* was ordered by Morrison, J., in Chambers, on the 27th of July, to bring up the proceedings. It was served on the 5th of August, and a return made to the writ on the 18th.



In Michaelmas Term last, *J. A. Boyd*, as counsel for Bingleman, obtained a rule *nisi* on the chairman of the quarter sessions and his associate, naming him, two of her Majesty's justices of the peace who were present at the same sessions in 1868, and Norman Yearke and John Nelson, to shew cause why the order and direction of the court of quarter sessions, at the said sittings, setting aside the verdict of the jury in favour of the respondent in the matter, and also the order and direction of the court that a new trial should be had in respect of the said appeal, and the said entry at the said sittings that the said conviction should be quashed, and quashing the same with costs, made after the said trial had been ordered, or some one of them, should not be set aside, and the said verdict of the jury ordered to stand in full force and effect by this court, for the following reasons :

1. A proper notice of appeal was not served.
2. A jury having been empanelled to adjudicate upon the appeal, their decision was conclusive, and not subject to be set aside and a new trial ordered.
3. The court acted illegally in setting aside the verdict and awarding a new trial in respect of the appeal, as they had no power to make any order or rule for such a purpose.
4. When the jury rendered their verdict it was the duty of the court to have ordered the verdict to be entered on record, and to have given judgment in accordance therewith in affirmation of said conviction, and the court had no jurisdiction to set the same aside and order the conviction to be quashed with costs or otherwise.
5. On the appeal of one party convicted the court has no power to quash the conviction as to another party convicted, who does not appeal.

The rule was enlarged until this Term, when

*F. Read* shewed cause. The notice of appeal was properly served by being left with the wife of the justice. The statute, Consol. Stat. U. C. ch. 114, sec. 1, requires it to be

given to the respondent or left with the convicting justice for him. In *Regina v. Justices of Yorkshire*, 7 Q.B. 154, the statute required the notice to be given to the justice and it was held sufficient to deliver it at his dwelling house, though not to him personally. The statute authorizes any person aggrieved to appeal. Yearke therefore being aggrieved, though only one of two, had a right to appeal, and when the conviction was properly before the court, being illegal, it was right to quash it. The return does not shew that any one applied for a jury, and a jury could not properly be empanelled unless required by one party or the other: Consol. Stat. U.C. ch. 114, sec. 3. Though the verdict of the jury affirmed the conviction, no judgment of the court was given on it. It is true in *Cavil v. Burnaford*, 1 Burr. 568, it is stated an inferior court cannot grant a new trial. The court of quarter sessions, however, is not an inferior court: Per Lord Tenterden, C.J., in *Rex v. Smith*; 8 B. & C. 343, and this court will not interfere with its practice: *Rex v. Hewes*, 3 A. & E. 725; or review its decision: *Rex v. Justices of Monmouthshire*, 7 D. & R. 334; *Rex v. Justices of Leicestershire*, 1 M. & S. 443. The conviction is bad on the face of it, because it gives a penalty and compensation both, which the statute, 25 Vic. ch. 22, does not allow. *Victoria Plank Road Company v. Simmons*, 15 U. C. R. 303; *Regina v. Watson*, 7 C. P. 495, seems to question if a *certiorari* will lie after conviction appealed to sessions, but subsequent cases, both in the Court of Queen's Bench and Common Pleas, seem to hold that it will.

*Boyd*, contra. All that is desired is to put the matter in the quarter sessions, where it ought to have been left by the court. They have no power to grant a new trial in a matter of appeal, nor to reserve a case under the statute: *Pomeroy*, app. and *Wilson*, resp., 26 U. C. R. 45. Both parties acquiesced in a jury, and having appeared and conducted the case before the jury, neither party can now object that they did not request it. When the new trial took place it was *ex parte*, and the respondent may even now

shew that a notice of appeal was not served on the proper party. Leaving it with the magistrate is not complied with by leaving it with his wife. The service must be personal on the party, or on the justice as his agent, *i. e.*, substitutional, and substitutional service when allowed must be strictly followed. It cannot be on some one else as agent for the justice, who is himself only an agent. In the case cited the service was to be on the justice for himself. The proper service of such notice is a condition precedent to having the case heard: *Woodhouse v. Woods*, 29 L. J. M. C. 149; *Morgan v. Edwards*, *Ib.* 108. As to one of two parties appealing, the notice of appeal should at all events have been confined to the conviction as regards the appellant: *Paley on Convictions*, 350; but *Regina v. Justices of Oxfordshire*, 4 Q. B. 177, seems an authority that a mere mistake in the form of notice as to whether the conviction is several or joint, is no ground for refusing to try the appeal. The appellate jurisdiction of the quarter sessions is by statute, Consol. Stat. U. C., ch. 114, which is silent as to new trials; and *Mossop v. Great Northern Railway*, 16 C. B. 580, 17 C. B. 136, shews that as a general rule an inferior court cannot grant new trials. The case of *Cavil v. Burnaford*, 1 Burr. 568, is to the same effect. *Tidd's Practice*, 9th ed., vol. ii., p. 905; *Rex v. Day*, Sayer 202; *Dickinson's Q. S.* 651; *Hespeler and Shaw*, 16 U. C. R. 108; *Regina v. Powell*, 21 U. C. R. 215; *Regina v. Peterman*, 23 U. C. R. 576, and other cases in our own courts, shew that a *certiorari* may issue to bring up a conviction from an inferior court after an appeal to the quarter sessions.

RICHARDS, C. J., delivered the judgment of the court.

The case of *Pomeroy*, appellant, and *Wilson*, respondent (26 U.C.R. 45), decides that the quarter sessions had no power to reserve for the consideration of this court, under Con.Stat. U. C. ch. 112, a case which has been appealed to that court under the statute allowing appeals to the quarter sessions.

The first section of that act enacts that, when any person

has been convicted of treason, felony or misdemeanor, before any court of quarter sessions, the justices may reserve any question of law which arose at the trial for the consideration of the justices of either of her Majesty's superior courts of common law. The act respecting new trials in criminal cases is the next in the Consol. Stat., ch. 113, and the first section is, whenever any person has been convicted of any treason, felony or misdemeanor, before a court of quarter sessions, such person may apply for a new trial. The language in the two statutes seems identical, and if the court of quarter sessions, when a case has been appealed, cannot reserve any question of law for the consideration of the judges of either of the superior courts, I do not think the court could grant a new trial in such a case, under the authority of ch. 113.

Then has the court of quarter sessions power, of its own original jurisdiction, to grant a new trial on the merits in a matter of appeal? In the case of *The Queen v. Bertrand* (L. R., 1 P. C. 526), in argument it is stated, "Granting new trials is a practice of comparatively modern date. The history of its introduction is to be found in *The King v. Mawbey* (6 T. R. 619), which was a case of misdemeanor only. In a note to the case of *The King v. The Inhabitants of the County of Oxford* (13 East, 410, 415), it is stated that there is no instance of a new trial being granted in a capital case. All the authorities upon the point are collected there." In the cases referred to, it is stated in argument, and apparently assented to, that granting new trials formed no fact of the common law jurisdiction of the court, nor was it given by statute, but arose out of the imperious necessity of doing justice. There was no remedy formerly in civil cases but the attaint of the jury, which, in its nature, was no satisfaction to the party wronged; but even this did not extend to criminal cases. The first instance recorded in the books of a new trial granted, was in 1648 (referred to in 1 Burr. 394) and then it was observed it had been done before. If a defendant were unquestionably guilty, and the jury acquitted him, though there is a palpable failure of justice,



yet the court cannot grant a new trial. On the other hand if the defendant be convicted of felony or treason, though against the weight of evidence, there is no instance of a motion for a new trial in such a case; but the judge passes sentence and respites execution till application can be made to the mercy of the crown.

The case of *The Queen v. Scaife* (17 Q. B. 238) an indictment for robbery removed by *certiorari* into the court of Queen's Bench, and tried at the Hull assizes, before Mr. Justice Cresswell, is the only recorded case where a new trial was granted in England in felony. That case is expressly over-ruled by the Privy Council in *The Queen v. Bertrand*, above referred to.

In a note to *The King v. The Inhabitants of the County of Oxford* (13 East, 416), it is stated, the authorities are unanimous that an inferior jurisdiction cannot grant a new trial upon the merits, but only for an irregularity, and this even in civil suits. Many of the authorities are there referred to. The same case in *East*, impliedly shews what has never yet been successfully contended for, as far as I am able to see, that the court of Queen's Bench will not issue a *certiorari* to remove an indictment for a misdemeanor and proceedings thereon at the assizes, after conviction and before judgment, sought for the purpose of applying for a new trial on the judge's report of the evidence, upon the ground of the verdict being against evidence and the judge's direction. In that case the motion was refused. If the judge of assize could have granted a new trial, there would have been no necessity for that application, and so astute a judge as Lord Ellenborough would have referred to that fact in his judgment; and the reporter, Mr. East, who adds many valuable notes and authorities to the case, a learned criminal lawyer, would have referred to such a power if it had existed.

The court of oyer and terminer and general gaol delivery are not courts of inferior jurisdiction as to granting new trials, more than the courts of general quarter sessions. If those courts could not grant a new trial on the merits, I

fail to see how the quarter sessions could. The fact that neither of the learned gentlemen who argued this case have been able to refer us to a single authority shewing that the quarter sessions could, independent of our statute on the subject, grant a new trial on the merits, satisfies me that the law must be, as I have always understood it to be, against such a power.

If such a power existed in ordinary cases, it may well be doubted if it would exist in exercising a statutory jurisdiction by appeal, when no such power is conferred by the statute.

We therefore come to the conclusion that the court of quarter sessions had no power to grant a new trial, or to order the conviction to be quashed with costs; and that the order granting a new trial and quashing the conviction must be quashed.

We make no order as to the court below issuing any process to enforce the conviction, as that is not sought for by the application now made to us; and if we were asked to do so, before issuing a mandamus we should require express authority to shew us that the quarter sessions would be bound to give effect to a verdict pronounced against the express direction of the court.

We think the learned chairman of the quarter sessions would have been warranted by the established practice at the assizes, in refusing to allow the party to call further witnesses, or his counsel to address the jury, after the undoubted established facts had clearly shewn, in the opinion of the court, that he had made out no case. It is unseemly to allow a counsel to address a jury, and to urge them to find a verdict against the ruling of the court, when the court itself will be obliged to tell the jury to find the other way. In such a contest the juries are in truth made the judges instead of the court, and the judge enters the arena as a contestant with the advocate for a favourable decision. Such displays are not calculated generally to assist in the administration of justice, or to induce respect towards those concerned in such administration.

*Rule absolute.*

## IN THE MATTER OF JOHN BARRETT.

*Selling liquor without license—Application for certiorari—Proof—Form of rule nisi.*

On an application for a *certiorari* to remove a conviction of one J. B. for selling liquor without license—

*Held*, 1. That the rule *nisi* was properly entitled “In the matter of J. B.,” and that it need not state into which court the conviction was to be removed, for that this was sufficiently shewn by the entitling it in the court in which the motion was made.

2. That on such a charge it was for the defendant to shew his license, not for the informant to negative its existence. The *certiorari* was therefore refused.

*Hurd* obtained a rule upon the Police Magistrate of Toronto and P. G. Boardman, the informant, to shew cause why a *certiorari* should not issue to remove the conviction of John Barrett, made on the 4th February last, for selling liquor without license, on the ground that there was no evidence that John Barrett was unlicensed.

The information stated that the complainant was informed and believed “that John Barrett did, within the last three months, to wit, on the 29th of January, sell wine, beer, or other spirituous liquors, without having a license to do so, contrary to law.”

The conviction stated that John Barrett is convicted, &c., for that on, &c., “he did sell wine, beer, or spirituous liquors, to wit, two glasses of whiskey, at and for the sum of five pence of lawful money of Canada, without having the license therefor by law required, contrary to law.” And that a fine of \$30 was imposed and \$2.85 for costs, to be levied by distress and sale of goods, or in default of sufficient distress that Barrett be imprisoned for thirty days, unless the fine and costs are sooner paid.

*Murphy* shewed cause. The rule was wrongly intituled. It should have been “*The Queen v. John Barrett*,” instead of “*In the matter of John Barrett*.” Nor does the rule state into which court the conviction is to be removed. The information and the conviction both shew that the defendant sold liquor “without having a license so to do, contrary to law,” and that sufficiently shews that the defendant was not licensed to sell.

The evidence returned need not negative the defendant's qualification, but read in connection with the information there was sufficient evidence against the defendant to call upon him to establish the affirmative: *Paley* on Convictions, 412, 124; *King v. Hanson*, *Paley* 123; 1 *Gude's Cr. Pr.* 222; *The King v. Turner*, 5 M. & Sel. 206; *The King v. Smith*, 8 T. R. 588; *The King v. Neville*, 1 B. & Ad. 489; *The King v. Stone*, 1 East, 653.

*Hurd* supported the rule. The rule is sufficient in itself, and the application on the merits is sustained by the licensing act of 1864, ch. 18, secs. 27, 28, and by the cases referred to of *The King v. Smith*, 8 T. R. 588, and *The King v. Stone*, 1 East, 653.

ADAM WILSON, J., delivered the judgment of the court.

The rule is not wrongly entitled. In moving for a *certiorari* in a civil proceeding, the affidavit should not be intituled in the cause in the court below (*Arch. Pr.* 11th ed. 1319); and intituling the affidavit in the court in which the motion is made is sufficient to indicate into which court the proceedings are to be removed (*Ibid.*)

After the rule is made absolute proceedings must be intituled, *The Queen* against the party (*Arch. Pr.* 11th ed., 1604); *Garland v. Burrows*, (T. T., 3 & 4 Vic., per Macaulay, J., in Practice Court).

I do not see any reason for a distinction between criminal and civil cases in this respect.

There is no such cause as *The Queen v. John Barrett* in this court, and until the rule is ordered that the cause of that style in the court below shall be transferred into this court, the proceedings are all properly intituled as they have been here.

As to the merits, it may be, though all *appeal* is taken away by the 32 Vic. ch. 32, sec. 25 of the Ontario act, that the remedy by *certiorari* is still in force to have a review of questions of law.

It was not said in the argument whether the conviction was under this last mentioned statute, which was assented



to on the 23rd of January, 1869, several days before the complaint was made, and before also the alleged offence was committed by the defendant, or under the 29 & 30 Vic. ch. 57. Probably under the latter act, for it was during all the time in question in force; but under whichever act it was, the result of the application must be the same.

There is no doubt that the general rule of law is, that the burden of proof lies on the party who substantially asserts the affirmative, though he may not do so in form. As in an action against a tenant for *not* keeping the premises in repair, the plaintiff on a traverse of this breach must prove the non-repair, for it is an essential element in support of his cause: *Seward v. Tegget* (7 C. & P. 603).

The same rule is applicable in criminal cases; as where it was alleged that the defendants had done certain acts without the consent of the owners, the prosecutor was bound to prove the want of consent: *Rex v. Hazy et al.* (2 C. & P. 458).

The legislature has, however, interfered in many such cases, and has either made it unnecessary to allege or prove the absence of consent, &c., or has shifted the affirmative proof of it on the defendant.

The rule of law, however, is equally plain, that where any one is proceeded against for doing an act which he is not permitted to do unless he has some special license or qualification in his favour, it is sufficient to charge this want of license or qualification against the party, and it is for him to prove his license or qualification affirmatively: (*The King v. Turner*, 5 M. & Sel. 206). In *Doe dem. Bridger v. Whitehead*, (8 A. & E. 575,) Lord Denman, C. J., said, when referring to several criminal cases which had been cited, "I do not dispute the cases on the game laws which have been cited, but there the defendant is in the first instance shewn to have done an act which was unlawful unless he was qualified, and then the proof of qualification is thrown on the defendant."

In *The King v. Hanson*, referred to in *Paley on Convictions*, for selling ale without a license, Abbott, C. J.,

thought that some *general* evidence of want of qualification should first be given by the prosecutor. (See also the observations of Alderson, B., in *Elkin v. Janson*, 13 M. & W. 662, who thought "there should be some evidence to start it, in order to cast the onus on the other side.")

In the case of *The Apothecaries' Co. v. Bentley* (Ry. & M. 159), the rule was laid down by Abbott, C. J., in direct terms, that the onus was cast upon the defendant to prove he had a certificate to practise, because he must be peculiarly cognizant of the fact, and he could easily produce it if he had it, and because it was more for the general convenience that he should be compelled to furnish this proof.

The general rule of law being that the sale of spirituous liquors is forbidden, except by certain qualified persons, it is not unreasonable to hold that they shall, on their right being questioned, prove their right and exemption from the prohibition. They can easily do so if they are in fact licensed, and it is for the general convenience they should do so.

The 32 Vic. ch. 32, sec. 1, declares that "no person shall sell by retail any spirituous, fermented, or other manufactured liquors, within the Province of Ontario, without having first obtained a license authorizing him so to do, as hereinafter provided."

This was the general purport of the previous statutes.

The defendant has not shewn he was a person licensed to sell, though he was charged with selling without such license. He has failed to justify the charge made against him by offering proof of his qualification, as it appears he was bound to do.

The rule will therefore be discharged with costs.

*Rule discharged.*

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## WALLACE ET AL. V. SWIFT ET AL.

*Contract to forward goods by a specified route—Deviation—Loss of goods by fire—Liability—Trover—Measure of Damages.*

The plaintiffs, living at Southampton, having purchased goods in Montreal, directed them to be forwarded to Kingston, to the care of the schooner "Regina." They were so sent in one of the mail steamers, but the captain of the "Regina" being unable to wait at Kingston, directed defendants, who were forwarders there, to send them on by the same steamer to Hamilton, and thence by the railway to Sarnia, where he would take them up on his way to Southampton. Defendants however shipped them from Kingston by a propeller, which was burned, with the goods on board, in the River St. Clair. They had been insured to go by the "Regina," but having been shipped on a different vessel the policy was cancelled.

*Held, Richards, C.J.*, dissenting, that the defendants were not liable in trover, the delivery to the propeller instead of the mail steamer not being a conversion; and that on a special count on the contract, for not sending as directed, only nominal damages could be recovered, the loss by fire being too remote.

Per *Richards, C.J.*, defendants were liable in trover; and *Quære*, whether on the special count the full value of the goods could not be recovered.

DECLARATION.—First count, that defendants were wharfingers and forwarders, and carried on the business of wharfingers on a certain wharf in the City of Kingston; and the plaintiffs were merchants carrying on business at Southampton, in the County of Bruce; and in consideration that the plaintiffs at defendants' request would cause to be delivered to them at their said wharf certain goods of the plaintiffs, which they had purchased in the City of Montreal for the purposes of their said business, and which were being carried from Montreal, to wit, a general assortment of hardware, merchandize, and shelf hardware, of the value of \$1600, to be by defendants, for reasonable wharfage and reward to them in that behalf, shipped and forwarded from their said wharf at Kingston in or on board the mail steamer, for the purpose of being conveyed therein to the City of Hamilton, and from thence to be carried by railway to the Town of Sarnia, and there shipped on board the schooner "Regina," to be carried therein to the said Town of Southampton, defendants promised that they would safely and duly ship and forward the said goods and merchandise on board the said mail steamer to the City of Hamilton, in the manner and for the purpose aforesaid.

And the plaintiffs caused the goods to be delivered to the defendants at and upon their said wharf, and defendants there received the same for the purpose and under instructions to be forwarded as aforesaid, and the defendants could, might, and ought to have shipped and forwarded the same in and on board the said mail steamer for Hamilton in manner and for the purposes aforesaid; yet defendants, not regarding their said promise nor their duty in that behalf, did not nor would ship said goods on board the mail steamer for Hamilton for the purpose aforesaid, but, on the contrary, they so carelessly and improperly conducted themselves in the premises, and in breach of their promise, and the instructions of the plaintiffs in that behalf, and without the plaintiffs' consent, shipped and forwarded the said goods and merchandise on board of another vessel, to wit, the propeller "North," to be carried thereon to a certain other place, to wit, Chicago, and the goods and merchandise afterwards, whilst being so carried on board the said propeller "North" up the River St. Clair, were, with the said propeller, burned and destroyed by fire and wholly lost, and by reason of the premises the plaintiffs lost and were deprived of the said goods and merchandise and every part thereof, and also incurred expense in causing the schooner "Regina" to proceed to Sarnia for the purpose of taking on board the said goods, in pursuance of and relying on the said instructions to the defendants; and the plaintiffs by reason of the total loss of the goods have been and are otherwise greatly injured.

Second count. Trover for the goods, describing them.

Pleas.—To first count, did not promise as alleged. To second count, not guilty.

The trial took place before Morrison, J., at the Fall Assizes of 1868, at Owen Sound.

It appeared that the plaintiffs in the fall of 1867 purchased in Montreal a quantity of bar iron, shelf hardware, and other merchandise, amounting in value to about \$1022, and they directed their correspondents to forward these goods to Kingston to the care of the schooner "Regina." In October, 1867, the schooner "Regina," being in Kingston,



the captain enquired for the goods and found they were not there. He telegraphed to the plaintiffs' vendors in Montreal, and on Friday, 18th October, received an answer that the goods would leave Montreal by the mail steamers (Spartan and Passport) for Kingston. The goods were shipped in Montreal to the plaintiffs by the mail line to Kingston, care of the schooner "Regina," for Southampton. The captain of the "Regina" not being able to wait until Monday, instructed defendants to forward the goods on to Hamilton by the same vessel, to be taken to Sarnia by the Great Western Railway, and the "Regina" would call there and take them on board. Defendants' shipping clerk, to whom the captain gave the order, desired a written memorandum, which was given to him, to that effect, and he promised to attend to it.

In the correspondence between defendants and plaintiffs' attorney, defendants said, "Our shipper desired the captain of the "Regina" to place his instructions in writing, whereupon he wrote the order, which has been mislaid." They also said in the same letter, that the captain instructed the shipper to forward the goods by the first conveyance offering to Sarnia. The order was not produced on the trial, and the captain's statement as to the effect of the order was as stated above. The "Regina" left Kingston on the evening of the 18th October, and reached Sarnia in about ten days after, but the goods were not at Sarnia.

The goods reached Kingston by the steamers "Passport" and "Spartan" on Tuesday, 22nd, and Wednesday, 23rd of October, and were shipped by defendants on the 30th of October, upon the propeller "North."

The first bill of lading was dated at St. Lawrence Wharf, Kingston, 30th October, 1867, as follows: Shipped in apparent good order and condition by James Swift & Co., of Kingston, in and upon the propeller "North," whereof — is master for the present voyage, and now lying in the port of Kingston, the undermentioned described property, being marked and numbered as per margin, to be delivered in like good order and condition at the port

of Chicago. Then followed the exceptions as to accidents. Below, in the body of the bill, was written: "Ex Str. 'Passport.'" Then below this was the number of bundles and bars of iron. Under the head "Consignment," Wallace & Stirton, Southampton, *viâ* Sarnia.

The other bill was in the same form, dated the same day, goods also to be delivered at Chicago. Then, in the descriptive part, under the heads:

(Marks.)	"Description."	"Consignment."
W. & S.	"Ex Str. 'Spartan'"	Then followed beneath the articles : The names of Wallace & Stirton were not mentioned under this head, nor was anything said as to Southampton <i>viâ</i> Sarnia, nor anything on it to indicate that the goods were to be sent to any other place than Chicago.
S.	3 boxes clock weights.	
	30 kegs nails, &c.	

The captain of the "Regina" stated that when he saw the plaintiffs about a fortnight after he left Kingston, he explained that he had done the best he could, and what he had done, and the plaintiffs were satisfied with what he had done.

The two bills of lading above referred to were sent to plaintiffs' attorney by defendants, in a letter dated 20th December, 1867. In a subsequent letter, dated 29th Feb., 1868, another bill of lading was sent.

The heading of that was similar to the other two, except that it was marked (copy), and dated 31st October, instead of 30th, and the blank for the master's name of the propeller was filled up with the name of Hayes, and the place of the delivery of the goods, instead of being Chicago, was as under.

Then under the head :

Under the head :

"Description."	"Consignee."
Ex. Str. "Passport."	Wallace & Stirton, Southampton <i>viâ</i> Sarnia. Lake freight to Sarnia, \$3 per ton.
50 bundles iron.	
130 bars "	
Same as in the bills above stated.	

Then follows:

(Marks.)	Ex Str. "Spartan."	Wallace & Stirton, Southampton, <i>viâ</i> Sarnia. Lake freight \$3 per ton.
W. S.	2 boxes clock weights.	
S.	30 kegs nails, and other enumerated articles as in bill secondly above referred to.	

Across this bill of lading was written an affidavit of John Patterson, in which he stated that the goods mentioned in the bill of lading were received on board the propeller "North," at Kingston, on the 31st October (1867), and that they were on board of the said vessel when she was burned in the River St. Clair, no portion of them having been landed or saved. The affidavit was sworn before one of the defendants as a notary public, on the 29th Feb., 1868. The day on which the "North" was burned did not appear at the trial.

The goods were insured to go by the "Regina," but being shipped on board the wrong vessel at Kingston, the policy was cancelled by the insurers.

At the close of the case the defendants' counsel contended that the plaintiffs had made out no case. 1. There was no loss proved. As to this, the plaintiffs' counsel referred to the letter of the 29th of Feb., shewing that the goods were on board the "North" when she was burned, and were therefore lost; and he urged that misdelivery of the goods was evidence of a conversion.

2. That the plaintiffs were only entitled to nominal damages: that there was no evidence of a conversion to sustain the count in trover, and as to the contract, the damages could only be nominal, the loss not being the natural result of the breach of contract.

3. That the captain was not authorized to enter into the contract.

The learned judge allowed the case to go to the jury, reserving leave to the defendants to move to reduce the verdict to nominal damages.

The only question left to the jury was, whether the defendants forwarded the goods by mail steamer from Kingston to Hamilton, to be there forwarded to Sarnia, and the amount of the damages.

The jury found for the plaintiffs damages \$1079.40.

In Michaelmas term last, *Anderson* obtained a rule *nisi* to reduce the verdict to nominal damages, or to such

damages as to the court might seem meet, pursuant to leave reserved, or for a new trial on the ground of misdirection, in ruling that there was any evidence of conversion of the said goods to sustain the second count.

The rule was enlarged to Easter term, when

*Harrison*, Q. C., shewed cause. The plaintiffs were entitled to the full value of the goods under the special count: *Crawford v. Great Western Railway Company*, 18 C. P. 510, is distinguishable. There defendants were held not liable for the omission of the owner to insure, especially as if they had received the goods their contract might have exempted them. Here the plaintiffs did insure, and the policy would have availed them if their instructions had been followed. The damages are therefore not too remote. Defendants also are liable under the count in trover. If a bailee deliver property to the wrong person, and it is lost or destroyed, that is a conversion, and the owner may maintain trover. *Ross v. Johnson*, 5 Burr. 2827; *Williams v. Gesse*, 3 Bing. N. C. 849, shew that a bailee is not liable in trover for mere negligence; but if he do anything, such as deliver to the wrong person, then he is: *Syeds v. Hay*, 4 T. R. 260; *Youl v. Harbottle*, Peake, 68; *Devereux v. Barclay*, 2 B. & Al. 702; *Stephenson v. Hart*, 4 Bing. 476; *Wyld v. Pickford*, 8 M. & W. 443; *Falk v. Fletcher*, 18 C. B. N. S. 403; *Redfield on Railways*, vol. II., p. 250; *Lubbock v. Inglis*, 1 Stark. 104.

*Anderson*, contra: There was evidence of a contract and a certain breach, and the damages claimed are not such as in an ordinary case would flow from the breach. The goods were to be sent forward by defendants. Not sending them in the manner directed is not necessarily a conversion of them, and the loss by fire was not damage which flowed from the breach complained of. The damage resulted from plaintiffs not insuring, and it is not shewn that the insurers would not have cancelled the policy if the goods had been sent to Hamilton; they would not, if so forwarded,



have been sent by the 'Regina' until they reached Sarnia, and the alleged reason for cancelling was not sending them by the "Regina." *Crawford v. Great Western Railway Company*, 18 C. P. 510, is an authority that damages by the fire are too remote.

In *Syeds v. Hay*, 4 T. R. 260, the delivery to a wharfinger gave him a lien inconsistent with the owner's right to the possession, and that might be evidence of a conversion. A wrong delivery of property is not necessarily a conversion. There must be either the intention or the effect of giving some claim inconsistent with the plaintiff's dominion over the property. Here at most there was only a mistake as to the manner of sending the property forward, and the plaintiffs' ownership over it was never interfered with. *Tear v. Freebody*, 4 C. B. N. S. 261, 263, shews that the question is, was there an intention to set up a claim at variance with that of the true owner: *Story on Bailments*, 5th ed., sec. 450.

RICHARDS, C. J.—Mr. *Anderson* admitted on the argument that the action on the special count could be maintained, but contended that the damages could only be nominal, for the plaintiffs' loss arose from not insuring these goods, and not from the breach of defendants' contract. The evidence shews the plaintiffs did insure these goods, and in the absence of any evidence to shew that the defendants notified them of their having disobeyed the orders they had received to forward them to Hamilton, so as to enable them to alter their policy of insurance, I think it might well be assumed that they have lost their property by the breach of the contract which defendants refused to carry out.

The cases generally referred to where the damages are too remote, and the principle contended for, that the damages are such as reasonably flow from the breach of the contract, hardly apply in this case. The breach which arises on the contract to carry is usually some negligence on the part of the carrier to send the same forward in time,

or some want of care on the part of their servants by which the goods are lost or destroyed. In these cases [the mere delay does not necessarily cause them to be set on fire, and therefore being destroyed by fire is not necessarily the damage which flows from the breach of the contract; nor is such a loss one reasonably in contemplation of the parties, for goods so sent are usually insured, when the carrier is by agreement of the parties relieved by loss from fire.

But when the loss arises from the destruction of the goods from the carelessness of the carrier or his servants during the carriage, the full value is always the damage that naturally flows from the breach of the contract to carry safely, and when the carrier delivers the goods to another by mistake even, it is said trover can be maintained against him for so doing.

But when the breach of the contract arises under circumstances such as to prevent the owner from protecting himself by insurance, and the destruction of the goods actually takes place, it seems to me not extending the rule to hold the party liable even on the contract for the full value of the goods.

Now the defendants' contract was to forward by the mail steamers to Hamilton, to be forwarded to Sarnia and thence to Southampton. The goods are destroyed in the mode of transit selected by the defendants contrary to the plaintiffs' instructions, which mode of transit enables the insurance company to repudiate the liability to pay the amount of the loss to the plaintiffs, and the variance in the mode of shipment was apparently not communicated to the plaintiffs in time to enable them to protect their interests by other insurance. The damage arising to the plaintiffs from this breach of the contract is the full value of the goods. It arises from causes they could not apparently guard against, and from the breach of the defendants' contract.

The case of *Ellis v. Turner et al.* (8 T.R. 531), though an action against a carrier and not strictly applicable, in some of its facts resembles this, and as to the question of damages

under the peculiar notice given to limit their liability it may perhaps be applicable to this case. The action was for not delivering according to their contract at Stockwith certain goods shipped on board the defendants' vessels at Hull. The goods were delivered to the master of the defendants' vessel on condition that he would deliver them at Stockwith as he passed to Gainsborough, which the master expressly undertook to do. The vessel arrived at Stockwith, and the master stopped and delivered part of the goods consigned there and was requested to deliver the rest, but he refused because they were underneath goods intended for Gainsborough. In going from Stockwith to Gainsborough the vessel, without any want of ordinary care or attention of the master or the crew, sunk in the river, and the plaintiff's goods were damaged. The defendants had given notice to limit their liability as carriers unless the loss occurred by want of ordinary care and diligence in the master and crew. It was urged that defendants were not responsible in that action, for the loss occurred by the misconduct of the master, and defendants were only liable in trover, but the court held the action could well be maintained.

I think, however, the authorities shew that trover will lie. The delivery of goods by a carrier or warehouseman to a wrong person without excuse seems to be a conversion in law. It often is a matter of difficulty to determine what constitutes a conversion. No doubt mere demand and refusal does not of itself make a conversion; it is only evidence to go to a jury to establish the fact, but if other circumstances repel the conclusion that there was a conversion the jury ought to find against it.

Some of the dicta in modern cases, taken by themselves, seem to go so far as to hold that the mere delivery to the wrong person by a carrier or warehouseman would not enable the owner to maintain trover. I do not find, however, that the cases of *Stephenson v. Hart*, 4 Bing. 476; *Stephens v. Elwall*, 4 M. & S. 259; *Youl v. Harbottle*, Peake 68; *Devereux v. Barclay*, 2 B. & Al. 702, and referred to in *Story on Bailments*, have been over-ruled.

In *Fouldes v. Willoughby*, 8 M. & W. 547, Lord Abinger said, "In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner." There the act of putting the plaintiff's horses off a ferry boat was held not to amount to a conversion, but other acts which followed, and in connection with putting the horses off the boat, were considered by some of the learned Barons evidence to go to the jury of a conversion.

In *Tear v. Freebody* (4 C. B. N. S. p. 263), Willes, J., said: "I apprehend that a person is guilty of a conversion if he takes away the goods of another for the purpose of depriving that other of the use of them, and acquiring the use of them himself." But this does not shew that there cannot be a conversion unless these intentions exist in the way laid down.

Maule, J., in *Heald v. Carey* (11 C. B. p. 993), said "There is no doubt that a negligent dealing by a bailee with goods is not a conversion; and there is equally no doubt that a bailee is not liable for a conversion arising out of a negligent dealing with the goods by him, but which is not an act participated in by him. He may be liable to an action of another description, but not to an action of trover, which only lies when some dominion is asserted by the defendant over the chattel which is the subject of the action."

In that case the court held the defendant had not done anything but what he had a right to do, except pay duties on the goods which he had rightfully received; and as to that, Maule, J., said "He paid the duty on the goods. It may be that he has incurred a charge which he could not recover from the plaintiffs; but the loss of his money is the only penalty."

Mr. *Anderson* urges that here the defendants assert no dominion over the goods. They do nothing to deprive the plaintiffs of the use of them, but merely place them on board the vessel to be taken to Sarnia, to be delivered to the plaintiffs as and for their own property.



The answer to that is, that they were directed to forward the goods by the mail steamer to Hamilton. They placed them on board the steamer "North" to be delivered in Chicago or perhaps in Sarnia. There is no evidence to shew that their omission to do as they were directed arose from any circumstances that would excuse or justify it. They chose to assert dominion over the goods inconsistent with the rights of the plaintiffs as owners by placing them on board the "North." When asked for explanation in the matter, they state what we must now assume to be untrue—that is, in the letter of the 20th December—that the captain of the "Regina" instructed them to forward the goods by first conveyance to Sarnia.

In that of the 24th January, they say "Our shipper is quite clear and positive as to the receipt of the order and instructions from the captain of the Regina;" and in a subsequent letter in January, they speak of having sent forward the freight by first opportunity, "which was the established custom, to say nothing of our instructions from the captain of the 'Regina.'"

The authorities in the United States on the vexed question of what constitutes a conversion do not, it is said, materially differ from those in England. "It is generally agreed that any use or disposition of a chattel without the consent of the true owner, and inconsistent with his rights, is a conversion. \* \* And so too where the original possession of the goods was lawful, as in the case of a bailment, its abuse \* by dealing with it in a manner not authorized by, or in violation of, the original contract, will be ground for an action of trover;" see the notes to *Burroughes v. Bayne*, in the American edition of 5 H. & N. p. 311.

The case for the plaintiffs may be briefly stated as follows: Defendants were authorized to forward the merchandise to Hamilton by the next steamer. They promised to do so. They not only did not do what they promised,—that might have made them liable only to an action for a breach of their contract as a *nonfeasance*—but they did

that which the plaintiffs did not authorize them to do, and in violation of their original contract made a disposition of the property which was inconsistent with the plaintiffs' right as owners to have their property disposed of as they directed, and in this way were guilty of a *misfeasance*, rendering them liable to be sued in trover.

The placing of the plaintiffs' property in the possession of the "North," disposed of it in such a way as to deprive the plaintiffs of their power to control it until it reached the destination named in the bill of lading, and in that way did what would be a conversion in law.

Under all the facts of the case, though not quite certain that the full value of the goods might not be claimed on the first count, I think the authorities shew that the plaintiffs have sustained the count in trover, and therefore the rule should be discharged.

ADAM WILSON, J.—The fact of unlading the goods at Kingston from the steamer that brought them there from Montreal, instead of leaving them on board to be carried by the same steamer from Kingston to Hamilton, and the fact of sending them from Kingston to Sarnia for the plaintiff at Southampton by a different vessel, instead of by the same vessel, to Hamilton, and thence to be conveyed by railway to Sarnia for the plaintiffs, do not in my opinion constitute a conversion, nor are they properly evidence of a conversion.

The transshipment at Kingston, and the destination from there by water to Sarnia by a vessel of defendants' selection, were acts arising from negligence or forgetfulness of orders, and not wilfully or perversely done. The defendants in no sense at any time intended to use the goods in any way by themselves or by others, and by no act of theirs were the goods destroyed or consumed, nor did they exercise any claim or dominion over the goods adversely to the plaintiffs. The act of unlading the goods, which is a mere asportation, is plainly not a conversion. The act of putting them on board a different vessel, going by a

different route from that which the plaintiffs had directed to be taken, but still pursuing a course very commonly taken, and one which the plaintiffs had themselves first intended to be taken, is not of itself a conversion, nor do I think it is evidence of conversion.

If a merchant in Kingston sold goods to a customer living there, and received orders to send them by a named messenger to the buyer's house, and if by mistake he delivered them to some one else to carry to the buyer's house, such mistake in delivering them to one messenger in place of another would not be a conversion.

If it were, the buyer could maintain an action of trover although the goods had been faithfully delivered to him by the unlicensed messenger.

If the person chosen by the seller were to make away with the goods, the seller would be liable for him, because the bearer would be his agent, and he might be sued for the conversion.

If, however, the seller's messenger were robbed of the goods, or fell into the water and lost them, by no fault of his own, but by superior agency, I do not think trover would lie against the seller for a conversion of the goods though I have no doubt he would be liable for a breach of contract in sending the goods by one person when he was directed to send them by another.

If defendants had put the goods on a vessel bound for Halifax before it would proceed to Sarnia, or were to send them by any other way so that it would be a complete deprivation of the plaintiffs of the goods, or create a very great delay before he could get them, such conduct would be of that wrongful and wilful nature as to be evidence of a conversion by them of the plaintiffs' property.

As unlading the goods at Kingston contrary to directions, and lading them on board a different ship by a different route, against directions also, were not from the evidence a conversion, what other act is there which can be said to amount to it?

The loss of the goods by the accident of fire was not a conversion.

I have referred to all the cases which bear on the question, and my opinion, from a careful perusal of them, is that the plaintiffs were not entitled to recover on the count in trover.

The case of *Falk v. Fletcher et al* (18 C. B. N. S. 403) shews what was plainly a conversion, that the defendants, who had got a quantity of salt on their vessel bound for Calcutta, put on board by the plaintiff subject to his own order, refused to give him a bill of lading of it, denying his property in it, and sailed with it to Calcutta, and sold it there. They were held to be liable for a conversion from the time the vessel sailed from Liverpool, the place of loading, for the salt was then lost to them.

At no time were the goods in question lost to the plaintiffs. They were theirs and remained theirs all the time subject to their own order and dominion, and on the direct course to their final destination, when they were casually destroyed by fire.

If the plaintiffs' argument were to prevail, it would prevent a forwarder from sending goods by a different railway train than the one of a particular day by which the owner had desired his goods to be sent, even if that train had been burned or damaged, or was so full that it could not have carried the goods.

The plaintiffs, however, are entitled to a verdict on the special count, and the question is, for what amount of damages, for a nominal or for a substantial sum?

The cases of *Glover v. London and South Western Railway Company* (L. R. 3 Q. B. 25); *Burton v. Pinkerton* (L. R. 2 Ex. 340); *Hoey v. Felton* (11 C. B. N. S. 142), and *Crawford v. Great Western Railway Co.* (18 C. P. 510), establish that the loss by accidental fire on board the vessel in the river St. Clair, is too remotely if at all connected with the defendants' breach of contract in shipping by that vessel, to make them responsible for the value of the goods destroyed.

The question might have been differently answered if the breach of contract had been the cause of the forfeiture



of the plaintiffs' policy on the goods, and whether the defendants knew of the policy or not, for it might have been presumed that they knew it was customary and almost universal, as part of the mercantile law, to insure merchandise against loss while on its transit; but it appears the policy was not forfeited by the defendants' act, but by the lateness of the goods in reaching Kingston, so that they could not go by the "Regina," and it was to the carriage on this vessel that the insurance alone was applicable.

I am not satisfied the master of the "Regina" had any authority to make the bargain for the plaintiffs with defendants on which the action is brought. The master of a vessel which is wrecked may act for the shipper as his agent, and transmit the goods by another ship; but here the master of the "Regina" had no control over the plaintiffs' goods in any way. The time when the plaintiffs adopted the bargain does not plainly appear, whether it was before or after the loss of the goods; if after, perhaps it was too late for the plaintiffs then to adopt the contract. My opinion does not turn on this, as this point was not argued; if it did, the plaintiffs should fail altogether.

As it is, the damages should be reduced to 1s., as a nominal sum.

MORRISON, J. concurred with Adam Wilson J.

*Rule absolute.*

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## THE ROYAL CANADIAN BANK v. CARRUTHERS ET AL.

*Bill of lading—Endorsement to bank—31 Vic. ch. 11—Alteration—Estoppel.*

B. held a bill of lading in duplicate for 100 barrels of flour on board the steamer "Corinthian," consigned to his order at Kingston. He sold the flour to H. at \$7 per barrel, and went with him to the plaintiffs' bank, where he endorsed the two bills in blank, and gave them to H. H. attached one to his draft for \$500, which he discounted, and applied the proceeds towards paying B. The duplicate bill of lading H. kept, and the next day he got B. to write on it, over his endorsement, "Deliver to order of H." This duplicate got into the possession of defendants at Kingston, not endorsed, and they obtained the flour there from the wharfinger by representing that they had B's order. Plaintiffs brought trover, and the jury found that there had been no sale of the flour by H. to defendants. On objections taken to the plaintiffs' title—

- Held* 1. That the bill of lading was valid, though signed by the purser, not by the master.
2. *Morrison, J.*, dissenting, that the endorsement of the bill of lading in blank was sufficient, without specifying that it was endorsed to secure the note discounted.
3. That the alteration, by converting the general into a special endorsement, was immaterial.
4. That under the circumstances, the endorsement by B. to the bank was sufficient without H's endorsement, either because B. was in truth the owner, or because H. having so represented to the plaintiffs, he and defendants claiming under him were estopped.
5. That the plaintiffs were entitled to recover the full value of the grain, not merely the \$500 advanced by them.

DECLARATION in trover, and on the common counts.

- Pleas—1. To first count, not guilty. 2. Not possessed.
3. To second count, never indebted. Issue.

The cause was tried at the last fall assizes for the County of York, before Richards, C. J.

The facts were as follow:—H. J. Boulton, Jr., had a bill of lading in duplicate, dated 7th August, 1868, for one hundred barrels of flour shipped on board the steamer "Corinthian" at Toronto, deliverable at Montreal to consignees, he or they paying freight and charges. He was consignor, and the consignee was "order of H. J. Boulton, Kingston."

Mr. Boulton sold the flour to S. G. Harvey on the 7th August, 1868, at \$7 per barrel. He and Harvey went to the plaintiffs' bank together on that day to get the money for the flour. The evidence of Mr. Boulton, who was called as a witness, was thus continued:

I put my name on the back of the bills of lading in blank before leaving my office that day for the bank. I got a check for the amount at the bank. I would not have delivered it until it was paid. At the bank I gave both bills to Harvey endorsed in blank. He went to the desk, prepared his draft, annexed the bill of lading and other papers, went to the back of the office, apparently left the papers there, drew a check which, was marked good, and handed it to me. Next day Harvey met me in the street. He had one of the bills of lading with him, which I supposed he got from the bank, and got me to put over my signature to deliver to his order; it was after the bank transaction. I was not asked to allow the special endorsement over my name to the bank. I would have permitted it if I had been asked. The flour was bought a couple of days before this. I supposed he was buying for Carruthers. The moment I got the check the flour ceased to be my property. It was generally understood Harvey was buying for Carruthers. I supposed he drew on Carruthers for the amount at the time. One of the bills passed directly through Harvey from me to the bank, for he went directly from me to the office. I was watching him. I went with him to the bank for the express purpose of seeing him pass it through the bank, and that I got the money. In delivering the bills to him I did not intend to pass the property in them until I got the money.

*John Michie* said, I am assistant cashier of plaintiffs' bank. I know S. G. Harvey and Mr. Boulton. A bill of lading was brought to the bank by them on the 7th August. The bank advanced the money by cashing Mr. Harvey's check for \$700: \$500 of the money was an advance by the bank on a draft by Harvey at one day after date on himself in Kingston, which he accepted.

The net proceeds passed to his order were.....	\$498 60
And he deposited.....	280 15

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\$778 75

Against this he drew a check in favour of Mr. Boulton for \$700, which was marked good. The check was paid next day. The bill of lading produced now was handed to me that day for the bank, and attached to the draft with the insurance receipt also attached; the bill was endorsed in blank by Mr. Boulton. On the faith of this, the bill for \$500 was discounted. I am not aware what was done with the other bill of lading. The draft was never paid, and the bank never got the flour. After Harvey and Boulton left the bank, one of the bank clerks put over Mr. Boulton's endorsement on the bill of lading "Deliver to the order of the Royal Canadian Bank at Kingston," and the same was forwarded that evening I believe to Kingston. I understood from Mr. Harvey he had bought the flour for himself from Mr. Boulton. He said he had been in the habit of sending flour to Mr. Carruthers at Kingston to sell for him, and he had charged such heavy commission that he was going down himself to sell it, to save the commission. The special endorsement on the bill is such as it is usual to make to prevent accidents in the event of the bill being lost.

Harvey was arrested in Kingston and brought up here in custody; we did not proceed against him because from what he said it made it appear a different transaction.

*George E. Small* said, I am plaintiffs' agent at Kingston. I sent to enquire if there was any flour for us and found there was not. Defendants got possession of it. In the first week of September I demanded the flour from defendants; they said they had a right to it, it was shipped to them by Harvey, and they would not give it up.

*James Swift* said, I am wharfinger in Kingston. The flour came to the wharf on the 8th August. Defendants sent for it. I refused to deliver it, as it was consigned to the order of H. J. Boulton. Afterwards I saw defendants' clerk, he said they had the order, and they wished to keep it on file and I could refer to it at any time. On this I delivered the flour to them without seeing the order. I saw it afterwards; it was endorsed to the order of S. G. Harvey, and not to defendants at all.



Sundry objections were taken by defendants' counsel at the close of the plaintiffs' case.

For the defence, *Samuel Harper* said, I am defendants' managing clerk. They employed Harvey last July to buy two hundred barrels of flour, two separate lots of one hundred barrels each. He drew on defendants on the 18th July, for \$665. I paid it. Two days after he drew for \$600, which was also paid. Defendants received the one hundred barrels of flour that came by the "Corinthian" under this bill of lading and invoice; invoice dated 7th August. This is all we ever received of the two hundred barrels. Harvey still owes us for one hundred barrels; did not hear the bank had any claim on the flour before the 9th September. It was all sold before then by defendants.

*Alexander McAllister* said, I am a clerk of defendants. I was sent to Toronto in the beginning of August. I saw Harvey on the 3rd August. I wanted some explanation why he had not sent the flour, and to get a settlement. He said he had got into trouble about some silver transactions, and had been obliged to use our money; some parties had come down on him and he was obliged to pay up. He proposed to buy flour and ship to replace it, he thought it better to buy flour and replace it in that way; flour was forty cents a barrel higher then. On the 4th August, Harvey and I went to Mr. Boulton's mill, and he bought one hundred barrels of flour there at \$7 a barrel. He told Boulton he was buying the flour for Carruthers & Co. The flour was not then made; it was to be ready by the 6th, to be shipped f.o.b. I got this bill of lading from Harvey on the 7th August, about 4 p.m. It had then only Mr. Boulton's name on it. I said I would prefer having it endorsed to him and by him to us. He objected at first; he said after he would take it to Mr. Boulton and get it done. He took it and brought it back made as it now is. I wrote the words on the bill of lading "Deliver to J. Carruthers & Co." Harvey refused to sign then; he assigned as a reason that he had changed his mind.

*S. G. Harvey* said, I bought the flour from Mr. Boulton

for myself. I did not send this consignment to defendants, it came into their hands. I paid for the flour, part of it by the sale of my horses, and the remaining \$500 by money got from the bank. One of the bills of lading was endorsed to the bank, the other I retained. I put it aside on my desk. I don't remember if McAllister asked me to give it to him. He picked it up off my desk, he appeared to think it was the original bill of lading. I was about telling him it was a duplicate. He suggested it should be endorsed to Carruthers. I said it had better be endorsed to myself. I had parted with it to the bank. I wanted it to go into its proper position, the bank claim first and then mine. There was a general account on which defendants were largely indebted to me. I sent my clerk to get the bill specially endorsed by Mr. Boulton. I was not in the office when my clerk brought it back. McAllister got it in my absence. I refused to endorse it to him. I never delivered the bill of lading to him, nor did he get it by my consent. I considered it so much waste paper.

A great deal of other evidence was given, which it is not necessary to state.

The jury on the direction given found for the plaintiffs, with \$700 damages, the full value of the flour, finding that Harvey did not intend to pass any interest he had in the flour, either in whole or in the interest which still remained in him over and above the plaintiffs' claim upon it for \$500.

In Michaelmas term last, *McKenzie*, Q. C., obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside and a new trial had, on the ground that the verdict was contrary to law and evidence, and for excessive damages, and for misdirection, and nondirection, in this :—

1. That the learned Chief Justice should have told the jury that the bill of lading having been given by

the purser or clerk of the steamboat "Corinthian," it could not be endorsed or transferred to the plaintiffs under the statute.

2. That the jury should have been told that the bill of lading not having been endorsed by the consignee, or by S. G. Harvey to the plaintiffs, no property was passed by it to the plaintiffs.

3. The jury should have been told that it should appear on the bill of lading, along with the endorsement, that it was endorsed to the plaintiffs as collateral security for the payment of a bill of exchange or note, within the meaning of the statute.

4. And they should have been told that the plaintiffs had altered the bill of lading in a material part, by inserting on the back of it, over Mr. Boulton's name, without his authority, the words "Deliver to the Royal Canadian Bank," and could not recover thereon.

5. And that the bill of exchange or note was not negotiated at the same time with the endorsement of the bill of lading, according to the statute, and so no property passed.

6. And that there must be a direct endorsement of the bill of lading to the plaintiffs from the owner or person entitled to receive the flour under it, to transfer the property to them.

7. And that the alleged delivery to S. G. Harvey as the alleged indorsee of Mr. Boulton, was insufficient to transfer the property under the statute, and that the mere delivery of a bill of lading by an indorsee of the original owner was not sufficient to give an incorporated bank title to goods under the statute, without being indorsed by such indorsee; and as Mr. Boulton had not delivered or transferred the bill of lading to the plaintiffs, or mentioned them as the parties entitled to receive it, the plaintiffs could not recover.

8. And that the defendants, having obtained possession of the property under a valid bill of lading, had a legal title to the property, and the plaintiffs, on the information

laid against S. G. Harvey, had admitted the property in the flour to be in defendants, and permitted them to use it as their property.

9. And that the plaintiffs were not entitled to recover more than the \$500 advanced by them to Harvey,

10. And that on the evidence the verdict should be for defendants.

In this term, *Harrison*, Q. C., shewed cause. The plaintiffs had the legal title to the flour by reason of the endorsement to them of the bill of lading before any one else than the original owner had acquired any title to it. Defendants got possession of it in Kingston from the wharfinger without a bill of lading, and the bill they afterwards got was not indorsed by Harvey, the special indorsee of the original owner. He referred to *Meyerstein v. Barber*, L. R. 2 C. P. 661; *The Marie Joseph*, 12 L. T. Rep. N. S. 236; *Caldwell v. Ball*, 1 T. R. 205; *Moakes v. Nicolson*, 19 C. B. N. S. 290. When the bill of lading is given in different parts, the part which is first endorsed transfers the property, and the bill of lading may be signed by owner, captain, or subordinate officer: *Evans v. Nichol*, 4 Scott N. R. 43; *Thompson v. Small*, 1 C. B. 328; *Short v. Simpson*, L. R. 1 C. P. 248; *Lickbarrow v. Mason*, 2 Smith's L. C. 699, 6th ed. If the captain allow the purser to sign the bills of lading, he is bound by the signature, though, as in this case, the signature be in the purser's own name. The statute does not require the captain to sign the bill of lading, but speaks of his *giving* it. Boulton's general endorsement on the bill of lading which was given to plaintiffs either endorsed to them and got the discount, or enabled Harvey to get it, or he endorsed to Harvey, who got the discount; and it was not necessary Harvey should put his name also on the bill of lading as indorsing to the plaintiffs, for the legal title in the flour passed as completely by delivering it with Boulton's endorsement in blank, as if Harvey had also endorsed it. It was contended that putting the special endorsement over Mr. Boulton's name by the bank, after



they got the bill of lading, avoided the endorsement upon it. This is not so, for the bank had the title by delivery of the bill with the general endorsement on it. It is customary for banks so to endorse bills of exchange and promissory notes : *Clark v. Pigot*, 1 Salk. 126 ; *Vincent v. Horlock*, 1 Camp. 442 ; *Byles on Bills*, 6th ed., 116.

As to damages, the plaintiffs are entitled to the full value of the goods, for after paying themselves they must, by statute, hand over the surplus to the person entitled to it, who is, as respects the plaintiffs, Harvey, and not the defendants.

*McKenzie*, Q. C., supported the rule. The bill of lading should have been signed by the master and not by the clerk. The clerk is a very inferior officer on board ship : *Abbott on Shipping*, 213. The plaintiffs by their charter 27-28 Vic. ch. 84, sec. 19, are prohibited from advancing money on goods unless under the authority of Consol. Stat. C. ch. 54, like the Imperial Act, 18 & 19 Vic. ch. III. The blank endorsement to the bank was contrary to the bank charter, for it professed to pass the absolute property in the flour to the bank. It should have been specially endorsed, and have had embodied in the endorsement that it was endorsed to secure an advance of money which the bank had made on it, and then it would have been a pledge, which is all the statute permits to be taken by banks in such kind of property. Harvey it is said is the person who is to get the surplus ; if so, it is because he is owner ; then he was the person to endorse to the bank, for the statute says the owner shall endorse. The writing of the special endorsement over Mr. Boulton's name without his consent avoided the endorsement : *Pigot's case*, 11 Co. 26 ; *Tidmarsh v. Grover*, 1 M. & S. 735 ; *Alderson v. Langdale*, 3 B. & Ad. 660 ; *Mollett v. Wackerbarth*, 5 C. B. 181 ; *Croockewit v. Fletcher*, 1 H. & N. 892 ; *Davidson v. Cooper*, 11 M. & W. 778 ; S. C. In Error, 13 M. & W. 343 ; *Master v. Miller*, 4 T. R. 320 ; *Hirschfeld v. Smith*, L. R. 1 C. P. 340 ; *Smith's Merc. Law* 288 ; Imperial Act, 17 Geo. III., ch. 30, sec. 1.

The plaintiffs, under any circumstances, are not entitled to recover more than the \$500, the amount of their claim.

He referred to the following additional cases : *Patten v. Thompson*, 5 M. & Sel. 350 ; *Kinloch v. Craig*, 3 T. R. 119, 783 ; *Smurthwaite v. Wilkins*, 11 C. B. N. S. 842 ; *Falk v. Fletcher*, 18 C. B. N. S. 403 ; *Key v. Cotesworth*, 7 Ex. 595 ; *Bryans v. Nix*, 4 M. & W. 776 ; *Bank of Ontario v. Newton*, 19 C. P. 258 ; *Glass v. Whitney*, 22 U. C. R. 290 ; *Dracachi v. The Anglo Egyptian Navigation Company*, L. R. 3 C. P. 190 ; *Kyle v. Buffalo & Lake Huron R. W. Co.*, 16 C. P. 76.

ADAM WILSON, J.—The result of the evidence shews the facts to be, that Mr. Boulton was the owner of the one hundred barrels of flour in question, which were shipped on board the steamer “Corinthian,” and a bill of lading or shipping receipt given to him of the same date, in duplicate, signed by the purser of the boat, deliverable to Mr. Boulton’s order at Kingston.

The two documents he endorsed in blank, and in company with Mr. Harvey went to the plaintiffs’ bank in Toronto, and there he completed the sale of the flour, which they had been negotiating before.

He endorsed the documents at the bank, and he delivered them there to Mr. Harvey for the purpose of enabling him to raise the money by discount to pay for the flour.

Mr. Harvey got a discount on his promissory note, and attached one of the documents to it, and he left the papers with the bank, and paid Mr. Boulton the price of the flour.

The duplicate bill of lading Harvey kept, though he should not ; but as the price of the flour was \$700, and the plaintiffs had advanced only \$500, he may have thought he was entitled to retain the other as a security for the surplus \$200 interest which he had still in the flour.

It was the retention of the duplicate which has created this litigation.

After the arrangement made with the plaintiffs, Harvey, either the same evening or the next day, got Mr. Boulton to write over his name on the duplicate the words “ Deliver

to order of S. G. Harvey," which Mr. Boulton did, as he thought, for the bank.

This duplicate found its way into defendants' possession, by Harvey's consent and delivery of it over as was sworn to by Mr. McAllister, the defendants' clerk, but without Harvey's consent and even against it as Harvey himself swears. Harvey certainly declined to endorse the duplicate to defendants, although their clerk wrote upon it "Deliver to order of J. Carruthers & Co.," and asked him to sign it.

The flour went to Kingston as shipped, deliverable to Mr. Boulton's order. Defendants got it from the wharfinger there, representing to him that they had Mr. Boulton's order, but they had not in fact, Mr. Boulton's order being in favour of Harvey, who had not endorsed it to any one.

The jury found Harvey did not sell the flour to defendants at all.

On these facts the plaintiffs had, beyond all question, the earlier title and the only title: *The Marie Joseph* (12 L. T. N. S. 236); *Meyerstein v. Barber* (L. R. 2 C. P. 44, 661); and Carruthers never acquired a title at all, even to the extent of Harvey's reversion or surplus interest beyond the plaintiffs' claim of \$500. For mere delivery of a bill of lading without endorsement will not pass title: *Akerman v. Humphery*, 1 C. & P. 57; *Mitchell v. Ede*, 11 A. & E. 903; *Barrow v. Coles*, 3 Camp. 92.

It was argued very strongly on their behalf that they had acquired a title; but suppose they did, it was after the transfer to the bank.

They say, however, the bank title is defective on various formal grounds, and was displaced by the title and actual possession of the property obtained by the defendants.

The first of the formal exceptions was, that the document called a bill of lading was signed by the *purser* of the steamboat, and not by the *master*, who is the only person spoken of in the Dominion Act, 31 Vic. ch. 11, sec. 7, as the person to give the document.

The master is the proper person to sign it both by custom and by statute, for he is the principal in charge

and represents the owner or affreightor of the vessel ; but, if he is not on board, the officer in charge may give receipts for freight, and instruments of that nature, as was done by the mate in *Craven v. Ryder* (6 Taunt. 433); *Ruck v. Hatfield* (5 B. & Al. 632); *Schuster v. McKellar* (7 E. & B. 704).

And whether the master be on board or not, the mate may, with the master's authority, give such documents by putting the master's name only : *Helmsley v. Loader* (2 Camp. 450); or by putting his own name only : *Johnston v. Usborne* (11 A. & E. 549); *Graham v. Musson* (5 Bing. N. C. 603); *Higgins v. Senior* (8 M. & W. 834).

As the master may sell the ship in case of necessity, he is also entitled to receive payment, and may authorize another to receive it for him : *Ireland v. Thompson* (4 C. B. 169).

It is not quite certain that this document is more than a mere shipping receipt, and not strictly a bill of lading, in which case certainly the purser could sign it if empowered to do so, as is not disputed : *Bryans v. Nix* (4 M. & W. 776.)

In *Cellier v. Hinde* (17 L. T. Rep. N. S. 341) it was provided that the master or the purser might affirm to the bills of lading.

Whatever it may be, the defendants cannot resist the effect of the document which the actual owner treated as valid, for the jury have found the defendants had no title whatever ; as regards this property they are mere wrongdoers.

The purpose of the statute was not to define what form mercantile documents should be in, nor to legislate with respect to their abstract import or operation.

The object was merely to declare that documents called bills of lading, &c., might be taken by banks, and be valid in their hands, "for the purpose of affording additional facilities in commercial transactions," according to the recital on which the original enactment of 22 Vic. ch. 20, was founded.



Whether the signature by the purser in his own name will bind the master remains still, under all these enactments, just the same as it did before they were introduced, to be determined by the general law applicable to such particular modes of execution.

It has been supposed that under sec. 9 of the act, no one but the owner, who is also warehouseman, can sign a receipt or acknowledgment that the grain is in store, that the clerk of the warehouseman and owner cannot do so for him, just as if the statute were providing for the form and effect of mercantile instruments, instead of the use that such well known instruments might be put to and be acted on by banks. If this objection is to prevail, it will follow that the master of a vessel will not be able to give such a receipt to the owner of the vessel, who is owner at the same time of the goods shipped. The master's receipt or bill of lading will be good to everybody else other than the owner of the vessel, but it will not be valid to him. Was this ever intended? Is this giving *additional* facilities to commercial transactions?

It is the invariable practice of those who charter ships, and so make them their own for the time, and no doubt for the absolute owners also, to have bills of lading of their own ventures, just the same as third parties have. But this statute, if construed as an act to settle the form and legal operation of mercantile instruments, instead of enlarging the use which may be made of them, will hamper trade and defeat many transactions honestly entered into, when there is no purpose to be answered by so limited and unnecessary a construction.

The first objection is not maintainable, nor the second either. As to the second objection, the consignee and owner did endorse the bill of lading.

The third objection was, that a mere blank endorsement to the bank was not sufficient under the statute, but the fact that it was endorsed as a pledge for payment of the note discounted upon its deposit and transfer should all have been specially set forth in the endorsement.

This objection has even more weight than the one respecting the person who is to sign the document, yet its enforcement would defeat every transfer to banks throughout the province.

These particulars are never inserted in the endorsation, and are not absolutely required to be inserted in it, because the legislature was providing *diverso intuitu*, though there is much in the mere wording of the act to give ground for the objection.

The statute provides that the receipt may, by endorsement, be transferred to a bank or to any private person, "as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, or any debt due to such private person, and *being so endorsed* shall vest in such bank or private person from the date of such endorsement all the right and title of the endorser."

But because I construe the act in a wholly different manner than has been attempted to be done, I am of opinion the ordinary endorsation of such documents was not intended to have been altered, and has not been altered by the act, and that it is not necessary the endorsement should specify that it was made (1) as collateral security for the due payment of a bill or note; (2) that the bill or note was discounted; or (3) that it was discounted by the bank in the regular course of its banking business.

This objection fails.

The fourth objection is not sustainable. There was no alteration of the bill of lading in a material point. Converting the general into a special endorsement to the bank, is a customary and warrantable practice as to bills of exchange and promissory notes, according to the cases referred to for the plaintiffs, and according to the case of *Hirschfeld v. Smith*, (L. R. 1 C.P. 340) cited by defendants' counsel; and I know of no reason why such a document as this, made transferable by statute, should not be dealt with in the like manner. It was making it as the endorser intended it to be, and as he impliedly gave the endorsees

authority to make it if they chose to do so. It is warranted also by what is said in *Lickbarrow v. Mason*, 6 East, 20. This objection fails.

The fifth objection fails too, because it is not true in fact.

The sixth and seventh objections, so far as they have not been answered, raise the further objection, that the endorsement should have been made by Harvey to the bank, as he was the purchaser of the flour from Boulton, and therefore the owner of it, and the endorsation by Boulton in blank was not sufficient to transfer the property in the flour to the plaintiffs; that Harvey's mere delivery of Boulton's endorsation, without his own endorsation, was of no avail.

The statute speaks of an endorsement by the owner or person entitled to receive such cereal grains, &c.

The evidence shews Mr. Boulton was the owner of and person entitled to receive the flour, down to the time he endorsed the bills or receipts in blank, and that he gave them to Harvey, not as Harvey's property, but simply to hand to the bank to raise the money on them which he was waiting to receive.

When the bank took the bills endorsed by Boulton, and gave the money to Harvey, the property in the flour from that instant was passed to the bank, for Boulton had entrusted Harvey with the bills for that very purpose, and whether Harvey ever paid Boulton would make no difference to the bank.

It was a transaction no doubt between the bank and Harvey, but as a fact it was a transaction between them and Harvey to perfect a transaction between Harvey and Boulton, and though it was Harvey's money, by reason of his discount, which was paid to Boulton, it was Boulton's property by and with Harvey's consent which was transferred by Boulton, or by his endorsation, to the bank. All three parties being present: the bank, and Harvey, and Boulton: and Harvey having represented that Boulton was owner, there was quite sufficient evidence of that fact, and he is estopped now from disputing it. Harvey did in

truth transfer the flour direct from Boulton, who had not, so far as Harvey was concerned, parted with the property at all, to the bank. It was therefore an endorsement by the owner to the bank, in truth, or one by estoppel, and in either case binding against Harvey and the defendants who claim under him.

Why any kind of endorsement good to a private person should not be equally good to a bank, I cannot comprehend. These objections fail also.

The eighth objection need not be discussed after what has been said. As a fact the defendants never had a title to the flour by endorsement of the bill of lading or otherwise, and whatever the plaintiffs may have stated in the information made against Harvey, can be no estoppel against them when they had not a full knowledge of the facts, or which the defendants can use in their favour.

As to the ninth and tenth objections, the defendants must fail. The plaintiffs must recover the full \$700, because the defendants not being the owners as respects the plaintiffs, who were pledgees merely, and the jury having negatived their right and Harvey disputing it, the plaintiffs must get it and appropriate the surplus at their peril, if they elect to recover it, though I do not say they are obliged to take more than their own particular demand.

RICHARDS, C. J. concurred with Adam Wilson, J.

MORRISON, J.—I regret that I cannot concur in the judgment just delivered; for, in my opinion, the bill of lading ought to have been specially endorsed to the bank in terms as collateral security for the due payment of the note in question; and I think that the endorsement in blank was not a compliance with the provisions of the statute 31 Vic. ch. 11, sec. 7, and as it was not so specially endorsed did not vest in the bank any right or title to the flour in question.

I cannot see that the requiring such special endorsement entails any trouble or throws any impediment in the way



of such commercial transactions, while, on the other hand, it avoids all doubt as to the object and terms of the transaction between the bank and the consignee; and, in my judgment, that was what the legislature intended and required by the provisions of the statute.

*Rule discharged.*

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## THE ROYAL CANADIAN BANK V. MILLER ET AL.

*Warehouse receipts—Con. Stat. C. ch. 54.*

The plaintiffs on the 20th September received a note for \$5800, payable to, and endorsed by L., with L.'s warehouse receipt for wool attached, which they discounted on the 4th October, 1867. On the 21st October, \$1179 only remaining due, they took a note for this sum from M., the maker of the previous note, with his receipt for some wool, in addition to a receipt from L. for what remained of the wool covered by L.'s previous receipt. It was not discounted however on that day, because M. did not pay the discount, and on the 5th December M. made another note for the same sum, at ten days, in place of it, which was discounted with the same two warehouse receipts attached. It was renewed on the 24th, with the same receipts, and not being paid the plaintiffs in April sold the wool, through a broker, who was unable to get it; and they thereupon replevied on the 9th May.

*Held*, following *Bank of British North America v. Clarkson*, 19 C. P. 182, that the warehouse receipts being taken directly to the Bank, and not by endorsement, were not within the statute, *Consol. Stat. ch. 54. sec. 8*, and that the plaintiffs therefore could not recover.

*Richards, C. J.*, and *Adam Wilson, J.*, however, dissented from that decision, though following it in accordance with the established practice.

*Held*, also, that the transaction of the 5th December might be considered as a new one, and that the plaintiffs therefore had not held the wool more than six months, so as to defeat their title, under *sec. 9*.

If they had, defendants might shew that fact under a plea of not possessed.

### SPECIAL CASE.

REPLEVIN for detaining wool.

Pleas denying detainer and that the goods were plaintiffs'.

The cause was tried at Toronto, before *Richards, C. J.*, when a verdict was rendered for the plaintiffs, subject to the opinion of the court.

The facts were, that on the 20th September, 1867, the plaintiffs received a note from Edward Leadley, or from John Miller & Co., for \$5835.65, made by Miller & Co.,

payable to and endorsed by Leadley. This note was discounted on the 4th October. A warehouse receipt signed by Leadley, for 23,123 lbs. of wool, was attached to the note as collateral security.

On the 21st October there was still \$1179, including interest, due on the note.

Miller asked the plaintiffs to release Leadley from the note, and to take Miller's own note, with his own warehouse receipt for 6,000 lbs. of wool, in addition to the balance of 23,000 lbs. of wool which was still in Leadley's warehouse unsold, amounting to 4,595 lbs. The plaintiffs agreed to this, and to discount the new note to be given for \$1179 on getting the two wool receipts.

Miller, on the 21st of October, gave the plaintiffs his note for \$1179, but because he did not pay the discount it was not discounted. The receipt for 6,000 lbs. of wool was attached to it.

The plaintiffs gave to Miller the note for \$5,835.65, and the receipt for 23,000 lbs. of wool attached to it.

On the 5th December Miller made another note for \$1179 at ten days, in place of the former one, and the same warehouse receipt for 6,000 lbs. of wool was attached to it, and Leadley, in pursuance of the above arrangement, gave his warehouse receipt for the balance of the first large quantity of wool, which was 4,595 lbs., and both receipts were attached to the note for \$1,179. This note was discounted, and Miller & Co., got the proceeds. It was not paid, but was renewed on the 24th December for \$1,175, with the same receipts as collateral security.

It fell due on the 5th January, 1868, and had not been paid in full yet. The plaintiffs directed the wool, in April, to be sold by a broker. It afterwards brought, net, \$1,169.71. The balance due on the note in June last, after the sale, was \$105.29.

The broker called on Miller & Co., about the 2nd of May about the wool, and not getting it then nor afterwards the plaintiffs replevied it on the 9th of May.

The case was argued in Michaelmas term last.

*Harrison*, Q.C., for the plaintiffs. It was contended at the trial for the defendants, as to the receipt for 6,000 lbs. of wool, which is alone in dispute, that the statute allowed the plaintiffs to hold a receipt of this kind for only six months, and that more than six months had elapsed from the time the plaintiffs got it and the time they acted upon it by taking possession of the wool, on either the 2nd or 9th of May: that the receipt was made by Miller & Co., direct to the bank, and was not endorsed to them, and an endorsement is all that the statute allows: that the original note was held till the 16th of December, and the receipt was collateral to it, and was not endorsed upon a discount being made, as required by the statute. If the time of holding the receipt for the 6,000 lbs. of wool is to be computed from the 21st October, 1867, until the 2nd of May, the six months allowed by Consol. Stat. C. ch. 54, sec. 9, had expired when the plaintiffs enforced the receipt or took possession under it. But the plaintiffs did not begin to hold the receipt until they accepted it and acted upon it on the 5th of December, by discounting the note for \$1,175, and computing from that time the six months had not expired on the 9th of May, when the wool was replevied: *Mercer v. Peterson*, L.R. 2 Ex. 304. The statute is only directory: *Pearse v. Morrice*, 2 A. & E. 96; *The King v. The Inhabitants of St Gregory*, 2 A. & E. 99. If the title of the plaintiffs is avoided by statute, the illegality should have been pleaded: *Fenwick v. Laycock*, 1 Q.B. 414. The fact of the receipt being direct to the plaintiffs, and not endorsed to them, cannot avoid the plaintiffs' title, for Miller & Co. could, under the 24 Vic. ch. 23, have made the order in their own favour and then endorsed it to the plaintiffs; and such an endorsement would in legal effect have been just the same as making the instrument itself direct to the endorsees. The bank may hold the wool under the 4th sec. of ch. 54: *Bank of Montreal v. McWhirter*, 17 C.P. 506; *Commercial Bank v. Bank of Upper Canada*, 7 Grant, 250; *Todd v. Liverpool and London Insurance Company*,

18 C. P. 192. On the case generally, he also cited *Holton v. Sanson*, 11 C.P. 606; *Glass v. Whitney*, 22 U.C.R. 290; *Woodley v. Coventry*, 2 H. & C. 164.

*McMichael*, contra: The receipt in question was not given to secure a debt then contracted, but to secure a past overdue claim, and is not therefore within the statute. The transaction of the 21st October was neither the creation of a debt nor the negotiation of a note. The six months must be computed from the 21st October, for the arrangement of the 5th December was merely the perfection of the agreement made on the previous day, and when completed it had relation back to the 21st of October. A plea of illegality was not required if the transaction of the 21st of October was not illegal. The receipt is inoperative in the hands of the bank, though no other creditor intervenes. If the receipt is to be maintained under section 4, it must be taken in conformity with that section. The receipt also should not have been made in the name of the bank, but endorsed to it, which is all the statute allows. The plaintiffs seem, by the receipt in this form, to be owners of the wool, whereas they are intended by the statute to be merely the assignees of it for a temporary purpose.

*Harrison*, Q.C., in reply: If this were an existing debt on the 21st October, the 4th section of the act applies; if it were not, then the transaction of the 5th of December maintains the plaintiffs' claim, for the six months had not expired when the bank took actual possession of the wool.

ADAM WILSON, J.—The Consol. Stat. ch. 54, sec. 8, does not, I think, confine banks, on a transfer to them of warehouse receipts, to a taking "by endorsement" only. The words of the statute are that receipts, &c., for cereal grains, &c., "may, by endorsement thereon by the owner of, or person entitled to receive such cereal grains, \* \* be transferred to any incorporated or chartered bank in this province, or to any person for such bank, or to any private person or persons, as collateral security for the due payment of any bill of exchange or note discounted by such



bank in the regular course of its banking business, or any debt due to such private person or persons, and being so endorsed shall vest in such bank or private person from the date of such endorsement, all the right and title of the endorser to or in such cereal grains, \* \* subject to the right of the endorser to have the same re-transferred to him, if such bill, note, or debt, be paid when due; and in the event of the non-payment of such bill or note or debt when due, such bank or private person may sell the said cereal grains," &c., "and retain the proceeds, or so much thereof as will be equal to the amount due to the bank," &c., "returning the overplus, if any, to such indorser."

The 9th section provides also that "no transfer of any such receipt," &c., "shall be made under this act, to secure the payment of any bill, note or debt, unless such bill, note or debt, be negotiated or contracted at the same time with the endorsement of such receipt."

The object of this legislation was to enable banks and private persons "to hold in pledge" such cereal grains, &c., "as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, or any debt due to any private person or persons;" and although the mode of giving such pledge is spoken of as by endorsement, it is not to be inferred from the language that it was meant to be by endorsement *only*, and by no other way.

The *mode* of giving effect to the object of the statute was not the primary purpose of the legislature. The intent of the enactment was to enable pledges to be taken on property represented by these commercial documents. The method of carrying out that intent was subsidiary and collateral to the principal purpose.

The person owning the goods in warehouse or elsewhere, when a receipt has been given to him by the bailee of them, will of course be the person who is named in the receipt as the person for whom they are held. Banks and persons making advances of money are not purchasers of, or dealers in, grain and lumber, though they do deal largely

in the securities for or symbols of such property—bills of lading, wharfingers' and warehouse receipts, dock orders, and delivery warrants. They take title therefore chiefly by *endorsement*—See the numerous cases in the reports, among which may be mentioned: *Brandt v. Bowlby*, (2 B. & Ad. 932); *Griffiths v. Perry* (1 E. & E. 680); *Turner v. Trustees of Liverpool Docks* (6 Ex. 543); *Short v. Simpson* (L. R. 1 C. P. 248.)

In *Cellier v. Hinde* (16 W. R. 184; 17 L. T. Rep. N. S. 341), the bankers were the consignees of the goods, and took title by their being nominees direct in the instrument, and not merely endorsees.

It was because banks and private persons affording money accommodation on such documents almost invariably took by endorsement, that that mode of obtaining title was specified in the act, but without any intention of the legislature to alter the law in that respect.

It must always be borne in mind that this enactment as contained in the original act 22 Vic. ch. 20, was, as is recited in the preamble, to "afford additional facilities in commercial transactions," and it is therefore an enabling statute by its provisions.

As is stated in 2 Saund. 96 *a*, note (1), as to the construction of grants, and the like rule applies to statutes:—"The chief intent of the parties is to *pass* the estate, and the *method* of doing it ought to be subservient to that end."

The like opinion is expressed by Willes, J., in *Meyerstein v. Barber* (L. R. 2 C. P. 44.)

So also, if one covenant to enfeoff another in fee, he will be held to have performed his covenant by making a conveyance of lease and release instead, although the two conveyances are attended with very different results: *Co. Lit.* 207; *Shep. Touch.* 140.

Why then should a title passed to the bank, by way of pledge, as receiptees of the goods direct, not be as good as a title to the same goods acquired by endorsement of the receipt? It is said, because the statute specifies the taking by *endorsement*, and no other species of title can be substituted for it.

I have endeavoured to reply to this answer.

Then, it is next said, the bank, if named in the body of the receipt, will appear either to be owners or will be expressed to be owners of the goods, and the statute permits them only to be pledgees.

But how will a blank endorsement shew that the bank are less owners than when they are named in the body of the receipt? Why may they not be shewn to be pledgees in fact?

Then it is said if they are receiptees the bank might themselves become borrowers of money, instead of lenders. But this does not follow. It is not to be presumed the banks will reverse their whole course of dealing for the purpose of giving effect to such an objection, and besides, why might they not as well become borrowers as endorsees as receiptees?

Now there may be cases put in which the bank might be forced to take actual possession of the goods, and to hold them with or without a receipt, or to take a receipt in their own name for them, and who then could tell that they were not owners but pledgees only?

Suppose, for instance, a bill of lading were endorsed to the bank, there would unquestionably be a good statutable title. When the goods arrived at their destination, either in this province or at "any other place whatever" beyond the province, the bank would be entitled to take possession of the goods, and to convey them to any place of deposit they chose, and to give up the bill of lading if they pleased as having answered its purpose.

In such case they would most assuredly appear to be the owners by their actual title of possession.

If, however, they placed the goods at the termination of the transit in a warehouse for safe keeping until the repayment of the advance they had made, in whose name would they take the receipt? Undoubtedly, in their own name. They could not be guilty of the folly of taking it in their pledgor's name, for he might refuse to endorse it over.

The case of *Meyerstein v. Barber* (L. R. 2 C. P. 38, 661), shews this course may be adopted; that is, that the bill of lading may be given up and the wharfinger's receipt taken in its stead.

The statute, if so closely construed as has been done, would prevent the *owner* of a vessel, or any one he expressly authorized, from signing the bill of lading, because the master of the vessel is alone mentioned. Now it cannot be contended that this statute was meant to invalidate titles derived to goods under bills of lading which have been given by the owner of the vessel, for whom the master is only an agent, or that its true construction requires that greater effect shall be given to the act of the agent than to the act of the principal. Indeed, if the act be rigidly construed, a signature by procuration for the miller, master, warehouseman, wharfinger, or carrier, will not answer; every such document must be *given* by them personally, and by no one else. This would not, I conceive, be affording "additional facilities to commerce."

It must be admitted that a person giving a receipt to himself for goods which he says he has received in store for himself is a very "absurd form," as Baron Parke said of a promissory note which was made by a man payable to himself, in *Hooper v. Williams* (2 Ex. 13).

Such a receipt, as such a note, is of no value whatever while it is retained by the maker of it. It becomes of value only by the endorsement of it to another; but the effect of that endorsement of a note is to make it in legal effect payable to the bearer generally, if the endorsement be in blank, or payable to the endorsee or his order, if it be specially endorsed: *Brown v. DeWinton* (6 C. B. 336); *Wood v. Mytton* (10 Q. B. 805); *Hooper v. Williams* (2 Ex. 13).

The person to whom such a note is endorsed, is not properly an indorsee; he does not take by endorsement at all.

Now why should not the same rule apply to these *absurd* warehouse receipts. They can become of value only when endorsed, but what is the effect of that endorsement? Is



it an endorsation at all? I do not think it is. The maker of it has gone through the farce of endorsing it, but he has not, nevertheless, made an endorsement, simply because it is not one in law; and everything may be stated in pleading and otherwise according to its legal effect, and in many cases it must be so stated.

The statute is, I think, only directory: *Rex v. Justices of Leicester* (7 B. & C. 6); *Aggs v. Nicholson* (1 H. & N. 165.)

If it had declared that the title conveyed otherwise than by endorsement should be void, perhaps the term, bearing in mind the general purpose of the act, might have been read voidable: *Yarborough v. Bank of England* (16 East, 12); *Rex v. Harrington* (4 A. & E. 618.)

If the objection is given effect to, it must follow that the moment after the delivery of such receipts to the bank, and after they have advanced their money on the faith of such delivery, the person who made them and gave them to the bank, and who received the money upon them, could demand them instantly again, and if the bank refused to deliver them up he could bring trover or detinue to recover them, or the goods which they represented.

This is the inevitable result of so narrow and unnecessary a construction of the statute.

It must be remembered also that every one of these objections must equally apply to private persons taking such documents as to banks, for the statute extends as well to them as to banks, and in their case at any rate this would not be affording to them additional facilities in commerce.

In my opinion this objection ought not to and cannot prevail. I had formed this opinion before the Common Pleas gave judgment in *The Bank of British North America v. Clarkson*, since reported in 19 C. P. 182, and though I have perused the judgment with much interest, it has not convinced me of its being a sound exposition of the statute, or that I have formed an erroneous conclusion upon the like facts.

Other questions have been raised upon the statute as to the effect of a bill of lading which has been given by the purser of the vessel, and not by the master—and as to the clerk of the warehouseman signing the receipt in favor of his employer, instead of the employer to himself, in the *absurd* form before mentioned—and as to the form in which the endorsement should be made, whether it should be special, stating the particulars of its having been endorsed as a pledge by way of collateral security for the re-payment of the advance made, or whether it may be done simply by the receiptee endorsing it in blank or specially to the bank. And upon all of them I have thought the banks should succeed; that the purser may sign; that the clerk may bind his master; and that a common endorsement is sufficient. And I believe these conclusions to be warranted by the statute (*a*).

The next question is, whether the wool was held by the bank in pledge for a period exceeding six months: that is, more than six months from the time the note was negotiated or contracted, which negotiation and contracting must be at the same time with the endorsement of such receipt.

The receipt was delivered to the bank on the 21st of October, with a note intended to be discounted; but it was not discounted, nothing was done with the note. The arrangement of the 21st of October was finally carried out on the 5th of December by the discount of a note of that date, and the receipt which had been left with the bank on the 21st of October was on the 5th December attached to the note of this last mentioned date.

If the time is to be computed from the 21st of October, the six months had elapsed during which the bank is to hold in pledge, but if from the 5th of December the six months had not elapsed.

If on this latter day Miller & Co., had made a bill of sale to the bank of the wool, in pursuance of an understanding come to on the 21st of October, even if the discount had

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(*a*) See the last case.

been then made, the bill of sale would be held to have been a concurrent transaction with the bargain made on the previous day, and would not be deemed to have been made in respect of a by-gone debt. That is the effect of the decision in *Mercer v. Peterson* (L. R. 2 Ex. 304), and of a numerous class of cases on which it is founded. But the plaintiffs do not want this receipt to have a retrospective operation. They say it is to operate only from the time when the agreement on which it was founded was perfected, that is, from the time of the discount of the note on the 5th of December.

Had the bank this wool in pledge by the receipt of the 21st of October on that day, and from that day till the 5th of December?

It may be doubtful whether they had or not. Probably Miller & Co., could not have compelled the bank to deliver up the receipt after the time specified in the note of the 21st of October had expired, or even after the bank had allowed part of the time then stipulated for, to go by, although the note itself had never been discounted. And I am inclined to think the bank had during the interval mentioned a pledge on the wool by virtue of the receipt; but what was there to prevent the parties renewing that pledge?

No doubt they could have done so on a perfectly new transaction, and I am inclined to consider the transaction of the 5th December as quite a new transaction, because the one of the 21st of October was not completed until that day: *Bloxsome v. Williams* (3 B. & C. 232.)

I do not think this receipt and the arrangement with respect to it can be deemed to have been within the 4th section of the act. The bank cannot evade the provisions of the 9th section as to the six months, by attempting to make a warehouse receipt for goods in store as an operative instrument under the 4th section, when the six months have elapsed.

I think that, as the statute provides that no such cereal grains, &c., shall be held in pledge by such bank, &c., for any period exceeding six months, the defendants

might shew, under a plea of not possessed, that the six months had expired, and so the bank was not entitled to hold the goods any longer as against the owner.

The defendants, after the expiration of the six months, could, I think, have maintained trover against the bank for the wool, or could have pledged it to another bank on a new warehouse receipt, and have transferred the property to the other bank: See *Fergusson v. Norman*, (5 Bing. N. C. 76). But, as before stated, I do not think the six months had run against the bank.

In my opinion the *postea* should be delivered to the plaintiffs; but as the Chief Justice is of opinion we should accept the decision of the Court of Common Pleas as governing this case, the *postea* must go to the defendants.

RICHARDS, C. J.—Let us take the case of a private person first. Suppose a judgment at law against a person living in Newmarket, for \$4,000, who has 5,000 bushels of wheat stored in a warehouse in Toronto. The holder of the judgment is about to issue execution and levy on this wheat, and sell it at sheriff's sale. The owner thinks by holding it over for a short time he can sell it to better advantage, and a friend of his is quite willing to advance the money to pay the judgment, and wait six months for his pay if necessary, provided he can hold the wheat as collateral security for his debt. He prefers having a warehouse receipt in his own name for the wheat, rather than take one endorsed to him by the owner. All parties meet at the warehouse; the facts are clearly stated to the warehouseman, and he gives the party making the loan a warehouse receipt for the wheat by direction of the owner; the party receiving the receipt signs a statement that he holds it as collateral security for the payment of his debt, subject to have it transferred to the debtor if within six months he pays the debt, and in the event of non-payment he is to give the notices and sell the wheat, and retain of the proceeds what will satisfy his debt, and pay the overplus to the debtor.



Will not the holder of that receipt be entitled to a lien on the grain mentioned in it for the payment of his debt, and could he not hold it for six months for that purpose, and sell it after giving the proper notice, and would he not be subject to the same liabilities and have the same privileges as if he had claimed under a receipt endorsed to him in the words of the Act? The owners of the warehouse would be bound to deliver it on their own receipt. No person could in any way set up any adverse claim to it. When the money was advanced on it, it was owned by the party to whom the money was advanced, and he authorized it to be transferred to another person, and there was good and valid consideration for all that was done. Such a transaction would have been valid before the statute; does the statute invalidate it?

Now why should not a bank be entitled to hold property transferred to it, when taken as collateral security for the due payment of a note discounted in their usual course of business, and in other respects the property being situated as required by the statute?

The argument, as I understand it, is that the banks, by their charters, in effect are prohibited from directly or indirectly lending money or making advances upon the security of any goods, wares or merchandise, or to deal in the buying and selling or bartering of goods, wares or merchandise, or to be engaged in any trade whatever, save such as generally appertains to the business of banking. There is also a provision as to taking security by way of additional security for debts contracted to the bank.

On referring to the statute of Canada of 1859, 22 Vic. cap. 20, from which sec. 8 of Consol. Stat. C. ch. 54, was consolidated, we find that the legislature, for the purpose of affording additional facilities in commercial transactions, enacted in effect that, notwithstanding any thing to the contrary in the charter of any bank, any bill of lading or any receipt given by a warehouseman, miller, wharfinger, master of a vessel, or carrier, for cereal grains, goods, wares, or merchandise, stored or deposited, *or to be stored or*

deposited in any warehouse, mill, cove or other place in this province, or shipped in any vessel or delivered to any carrier for carriage from any place whatever to any part of this province, or through the same, or on the waters bordering thereon, or from the same to any other place whatever, and whether such cereal grains are to be delivered upon such receipt in species, or to be converted into flour, may, by endorsement thereon by the owner of or person entitled to receive such grains, goods, &c., be transferred to any incorporated or chartered bank, or to any person for such bank, or to any private person, as collateral security for the due payment of any bill of exchange or note discounted by the bank in the regular course of its banking business, or any debt due to such private person, and being so endorsed shall vest in such bank or private person from the date of such endorsement, all the right and title of the endorser in such grains, goods, &c., subject to the right of the endorser to have the same re-transferred to him, if the bill, note or debt be paid when due. And in the event of the non-payment of the bill, note, or debt when due, the bank or private person may sell the grains or goods and retain the proceeds, or so much thereof as will be equal to the amount due to the bank or private person, returning the overplus, if any, to the endorser.

This statute is not confined to banks alone, and, as may be inferred from what is already stated, I think some of its provisions, as applicable to a private individual, must be considered directory only, and not mandatory.

The important and essential matters to charge the property with the advance and make it collaterally liable for it seem to be, that the property on which the collateral security is to prevail must be in the possession of a warehouseman, forwarder, &c., as mentioned in the Act, and probably he must give a receipt therefor; the note or bill, in case of a bank, must be discounted in the regular course of its banking business, and the bill or note must be discounted, or the debt of the private person contracted, at the same time that the loan or security is created. The

security cannot exist longer than six months. The bank or party receiving the security can only sell it after giving ten days' notice of the sale, and can only retain the amount of the debt and expenses, returning the overplus, if any, to the party from whom the security was received.

This seems to me what is accomplished after the literal words of the statute are carried out in their most minute particulars. I do not understand the 8th, 9th, and 10th sections of the Consol. Stat. C. ch. 54, were enacted for the purpose of defining a particular mode of creating a collateral security on goods, to be available by, and applicable to, banks alone, for it certainly extends to private persons. I understand that the object or intent of the legislature was to provide a mode by which collateral security might be taken to secure a debt about to be contracted; but I do not understand that unless carried out in the very words of the statute, the security was to be void and of no effect as against creditors or subsequent purchasers for value, as in certain conveyances under the registry laws, or mortgages under the Act of Upper Canada respecting mortgages and sales of personal property, Consol. Stat. U. C. ch. 45; more particularly as the property on which the security is given is generally not in the hands of the seller, but of a warehouseman, the giving of a false receipt by whom is made an indictable offence.

No doubt it would be better and safer for all parties to carry out the statute in its very words, but if what appear to be the essentials of the statute are complied with and carried out, it seems a harsh view to take of the law, to say that those who have advanced their money in good faith, intending to carry out the law, are to lose that money merely because some matter which appears to be a matter of mere form is not complied with. The Interpretation Act of Ontario, 31 Vic. ch. 1, sec. 8, sub-sec. 39, shews that all statutes are to be considered as remedial, &c.

The general doctrine as to what are mandatory and what are directory provisions in statutes seems to be, that unless the provision of the statute is unequivocally mandatory, so

that it is of the very essence of the thing to be done, then it will be held to be directory only, except when the statute itself shall declare that it shall be void unless so done.

One of the illustrations put by my brother Wilson in this case seems to me to create a dilemma in working out this statute literally, and the points taken by the learned counsel for the defendant in the suit of *These same plaintiffs v. Carruthers*, all have a tendency to lead my mind to the conclusion that many of the provisions of the act are only directory, and not mandatory.

Take the case suggested, of a bank discounting a note with the collateral security of a bill of lading on a cargo of wheat endorsed to the bank in the very words of the statute. Suppose the vessel arrives at Toronto and discharges her freight, according to the terms of the bill of lading. The *transitus* is at an end. Who is to get the receipt from the warehouseman here? Is it the original consignee in the bill of lading, or the bank to whom it is assigned? If the original consignee, he may of course get another note discounted and assign the warehouse receipt as collateral security, and then some one will be defrauded. If the bank take a receipt for it in their own name, that, I understand it is contended, is against their charter, and the warehouseman may set that up against the bank, and keep the wheat from them. I should have thought, in the state of facts to which I refer, the bank would have been the proper party to receive the warehouse receipt. But the bank would hold the wheat under the statute, and in accordance with the terms on which they obtain the assignment of the bill of lading, namely, as collateral security for payment of the note discounted by them, and which at the time the note was discounted was transferred to them for that purpose.

It is not necessary or desirable to pursue the discussion of this matter further at present, nor to explore the decided cases as to what are to be considered mandatory and what are merely directory clauses in Acts of Parliament.

I think we ought to follow the judgment of the Court of Common Pleas in this matter, for I understand the impor-



tant facts in the case of *Clarkson v. The Bank of British North America* decided in that court, (19 C. P. 182) are not distinguishable from those in this case. If the parties desire to have the judgment of the court in this case, I think, in following the decision of the Court of Common Pleas, we ought to intimate to the parties that we have not been able to bring our minds to the same conclusion as that arrived at in that case, so that the matter may be taken to the Court of Appeal, and the law settled as far as our own tribunals are concerned.

MORRISON, J., not having been present during the argument, gave no judgment.

*Judgment for defendants.*

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#### WRIGHT V. GARDEN AND WIFE.

*Married women—Contract by—C. S. U. C. ch. 73.*

*Held*, that a married woman having separate real property is not entitled by Consol. Stat. U. C. ch. 73, to contract debts for its improvement so as to make herself liable individually, *Adam Wilson, J.*, dissenting, or jointly with her husband.

The declaration alleged that the woman married before the 4th May, 1859, without a settlement, and having separate real estate, and after her marriage employed the plaintiff to repair a house on it, for which neither she nor her husband would pay.

*Held*, on demurrer, that the action would not lie.

DECLARATION.—For that whereas the defendant Elizabeth Sarah Garden was before and at the time of the making of the agreement hereinafter mentioned, and still is the wife of the defendant John George Garden, and was married before the 4th of May, 1859, to the said defendant J. G. G., without any marriage contract or settlement. And whereas the defendant E. S. G., before the said 4th day of May, 1859, became possessed to her separate use of certain real estate on which a house is now situate, being, &c., (describing the land), and which has not been taken possession of by her said husband, by himself or his tenants. And whereas the defendant E. S. G., continued so possessed of said lot of land and premises up to and at the time of the making of the agreement hereinafter mentioned, and

still is so possessed. And the defendant E. S. G. being so possessed of said property to her own use, and in the management and enjoyment of her said property being desirous of improving the house on said premises, applied to the plaintiff, being a carpenter, to make such improvements. And thereupon, in consideration that the plaintiff, at the request of the defendant E. S. G., would make certain repairs and improvements upon and to the said house so belonging to the said E. S. G. as aforesaid, according to her directions, so as to enable her, the said E. S. G., more fully to have and enjoy her said property, she, the said E. S. G., promised the plaintiff to pay him the reasonable value of the work so to be done by him upon the said house. And the plaintiff, relying upon the said agreement, and in a reasonable time in that behalf, did do and execute divers works, repairs, and improvements, to and upon said house, in all respects in accordance with the directions of the said E. S. G., which said works, repairs, and improvements, were reasonably worth a large sum, to wit the sum of \$1000; and all conditions were fulfilled, and all things happened and were done, and all times elapsed necessary to entitle the plaintiff to maintain this action, yet the defendants J. G. G. and E. S. G. have not, nor has either of them paid the plaintiff the value of the said works, or any part thereof, but the same and every part thereof remains due and unpaid.

Demurrer, on the grounds, 1. That the said defendant being a married woman at the time of making the said contract, as appears by the said declaration, could not by reason of her coverture legally make a contract such as in the declaration is alleged. 2. That it is not shewn what work was done, or the nature of the work done by the plaintiff for the defendants.

The case was argued during Hilary term last.

*Bell*, Q.C. (of Toronto), for the demurrer, cited *Royal Canadian Bank v. Mitchell*, 14 Grant, 413; *Emrick et ux. v. Sullivan*, 25 U.C.R. 105; *Kraemer v. Gless*, 10 C.P. 470; *Chamberlain v. McDonald*, 14 Grant 447.

*Harrison*, Q.C., contra, cited *Johnson v. Gallagher*, 4 L. T. Rep. N. S. 72, 7 Jur. N. S. 273, 30 L. J. Chy. 298; *Hall v. Waterhouse*, 12 L. T. Rep. N. S. 297, 11 Jur. N. S. 361.

RICHARDS, C. J.—The question arising in this case is whether a married woman having separate real property which, under the Consol. Stat. U. C. ch. 73, she is entitled to have, hold and enjoy, “free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried,” can contract, either expressly or by implication of law, a debt for the improvement of that property, without the consent of her husband, so as to make them jointly liable in an action for the debt so contracted, or to make her individually liable to be sued at law for the debt so contracted after marriage, though such improvements may enable her to enjoy such property in a more full and ample manner than she could have done had they not been made.

No express authority is given under the statute to a married woman to contract debts after marriage, and it seems conceded from the different provisions of the act, taken together, and of the Consol. Stat. U.C. ch. 85, that she cannot convey her land except by a deed executed jointly with her husband, and acknowledged in accordance with the terms of the last-mentioned act.

The statute 22 Vic. ch. 34, sec. 14, as originally framed, might imply a power to contract debts on the part of a wife after marriage, for which she would be liable, in the event of no ante-nuptial settlement, to the extent and value of her separate property, in the same manner as if she were sole and unmarried. But by the Consolidated Act, ch. 73, sec. 14, the word “hereafter” is omitted after the word contract and before the word made, so that the section now reads, “Every married woman having separate property, whether real or personal, not settled by any ante-nuptial contract, shall be liable upon any separate contract made

or debt incurred by her before marriage (such marriage being since the 4th May 1859), or after this act takes effect, to the extent and value of such separate property, in the same manner as if she were sole and unmarried."

The object of this section as it now stands, taken in connection with sec. 18, seems to be to make the property of the wife liable for debts contracted by her before marriage, and to relieve the husband from the common law liability which he would incur by the marriage to pay his wife's debts; and sec. 15, makes him liable for her debts before marriage to the extent or value only of the interest he may take in her separate property on a contract or settlement of marriage.

Sec. 18, refers to proceedings at law or in equity by or against a married woman upon any contract made or debt incurred by her before marriage, and enacts that her husband shall be made a party if residing within the province, but if absent therefrom, the action or proceeding may go on for or against her alone; and in the declaration, bill, or statement of the cause of action, it shall be alleged that such cause of action accrued before marriage, and also that such married woman has separate estate; and the judgment or decree therein, if against such married woman, shall be to recover of her separate estate only. The remainder of the section refers to the effect of the husband pleading a false plea.

Surely, if the legislature contemplated an action or proceeding against the married woman on any contract made or debt incurred by her after marriage, provision would have been made for it. The absence of such provision seems a strong argument in favor of the view that no such liability could arise. The third section makes the separate property pecuniarily liable on an execution against her husband for her torts.

The cases decided under the statute seem to me to dispose of the question raised under this demurrer.

In *Kraemer v. Gless* (10 C.P. 470), it was held that the statute did not enable a *feme covert* to bind herself as a



*feme covert* to a greater extent than she could do before the passing of the act.

The 13th section of the act declares that any *estate* which the husband may by virtue of his marriage be entitled to in the real property of his wife, shall not during her life be subject to the debts of the husband. This the court, in *Emrick et ux. v. Sullivan* (25 U. C. R. 105) seemed to think implied that the estate which the husband had by the marriage in his wife's realty was, being jointly seized with her during the coverture in her right in her real estate, and then he would be a necessary party to the conveyance of such an estate, and at common law he alone could lease for a term. If the husband has an interest in the wife's real property by virtue of the marriage, I do not see how she can by her own individual act, without his consent, affect that interest so as to render that property liable to be sold under an execution at law, which would be the effect if this action can be maintained.

*Scouler v. Scouler* (19 U.C.R. 106), decides that under the statute a married woman cannot sue alone to recover possession of real estate acquired by her before the coverture, when she married since 1859.

The very able judgment of Vice Chancellor Spragge in *Royal Canadian Bank v. Mitchell* (14 Grant, 412), takes up the doctrine of equity as to the separate estate of a married woman being liable for her debts, and shews how it is acted on in England and under the general rule in equity which prevails. He sums that branch of his argument up as follows: "The principle of the decisions is, that a married woman entering into a contract, having separate estate, and having as incident to it a right to dispose of it, and being *not personally liable* upon her contract, is presumed to contract with reference to her separate estate, and to intend to charge it. But such presumption cannot arise where she cannot charge her real estate; where, even if she had done so in express terms, it would have been unavailing. It would infringe the maxim that a person cannot do indirectly that which he cannot do directly."

The learned Vice Chancellor further observes, "The general scope and tenor of the act is to protect and free from liability the property, real and personal, of married women; not to subject it to fresh liabilities, except in the case of her torts and of her debts and contracts *before marriage*. The change made in the 14th section applies with peculiar force to the case before me. It is an unmistakeable manifestation of intention that the separate estate of married women shall be liable only upon debts incurred or contracts made *before marriage*."

In *Chamberlain v. McDonald*, in the same volume of the U. C. Chancery Reports at page 448, the learned Chancellor of Upper Canada declared that he agreed with the judgment of Vice Chancellor Spragge in the view he took of the Married Women's Act in *Royal Canadian Bank v. Mitchell*. Vice Chancellor Mowat suggested that as to personal property, the wife might have a power of disposing of it independent of her husband, but as to real estate he thought there was more reason for denying it.

The cases of *Hall v. Waterhouse*, before Vice Chancellor Stuart, 24th April, 1865, reported in 12 L. T. Rep. N. S. 297, and *Taylor v. Meads*, before Lord Chancellor Westbury, 11th Feb. 1865, reported in the same volume at p. 6, with the exhaustive judgment of Lord Justice Turner, on the 15th March, 1861, in the case of *Johnson v. Gallagher*, reported in 4 L. T. Rep. 75, shew what the rule of the Court of Equity is as to charging the separate property of a married woman with the payment of her debts, when it is held free from the control of her husband. In all these cases it is expressly declared that the married woman, whether living separate from her husband or not, is not personally liable on the contract, and that only her estate is liable for her debts. See also the observations of Mr. Justice Gwynne in *Balsam et ux. v. Robinson* (19 C.P. 269).

I think the decided cases under our own statute are binding on this court, and I should feel bound to follow them until reversed, even if I doubted their correctness on the point now under discussion, which I do not.

I think there must be judgment for the defendants on the demurrer.

MORRISON, J., concurred.

ADAM WILSON, J.—The law relating to the property and rights of married women has been very materially altered, both in England and in this country, within the last few years.

By the divorce act, Imperial Statute 20 & 21 Vic. ch. 85, assented to on the 28th August, 1857, the wife is in certain cases clothed with an independent personal *status* at law with respect to her rights and property, similar to the rights which she possessed and possesses in equity with respect to her separate estate.

In this province the legislation is contained in Consol. Stat. U.C. ch. 73, the original act being passed on the 4th of May, 1859.

The 14th and 18th sections are the only ones which specifically refer to the contracts of married women. But the 14th section refers only to those contracts of women who have been married since the 4th of May, 1859, which they had made before their marriage.

The 18th section provides, that in any action or proceeding at law or in equity by or against a married woman, upon any contract made or debt incurred by her before marriage, her husband shall be made a party to it if residing in the province, but if absent therefrom the action or proceeding may go on for or against her alone.

In such proceeding it must be averred the cause of action accrued before marriage, and that the woman has separate estate, and the judgment or decree, if against the woman, shall be to recover of her separate estate only, unless the husband plead or put in a false plea or answer, in which case he is to pay the costs occasioned thereby.

There are four cases under this act in which the contracts of a married woman may have to be considered:—The contracts made *before* marriage, observing the distinction

whether the marriage was before or after the 4th of May, 1859; and her contracts made *after* marriage, observing the same distinction as to the time of her marriage.

The 14th section of the act, it will be seen, applies expressly to only one of these four cases: to the contracts of a woman, made before her marriage, who has been married since the 4th of May, 1859. In such case she is to be liable to the extent and value of her separate property, in the same manner as if she were sole and unmarried. By the 18th section her husband must be joined as a defendant in the suit with her, if he is resident in the province.

There does not seem to have been much necessity for this express provision in the case alluded to, unless for the purpose of saving the husband's property when the wife had a separate estate. Without this provision both the husband and wife would by the general law have been liable to be sued for all the debts of the wife contracted *dum sola*, and on a judgment recovered against them the property of both or each of them would have been liable.

It must therefore be considered as a benefit intended for the husband only.

A contract made by the woman when single, is not properly a separate contract, and the expression separate estate has application and meaning only during the coverture. Before marriage the woman's property is not separate estate. On the death of her husband her separate property which she had during his life ceases to be separate property, and on a re-marriage it becomes separate property again.

The 18th section goes beyond the 14th section, for it protects the husband from all debts contracted by his wife before marriage, whether the marriage took place before or after the 4th May, 1859, for it makes no difference in this respect; and in all cases where he is joined with her in the suit, the judgment or decree, if against her, is to be against her separate estate only.

And even when the husband, since the 4th of May, 1859, takes an interest in his wife's separate property under any



settlement on marriage, he is by the 15th section only to be liable for her ante-nuptial engagements to the extent or value of that interest, and no more.

The husband is therefore not liable for his wife's debts contracted before marriage, out of his own estate, when she has separate property, or there is a marriage settlement.

Practically, this may relieve the husband in every case from his wife's engagements entered into *dum sola*, for in every case the wife must have some separate property. It is difficult to conceive the case of a woman having no separate estate of any kind at the time of her marriage, or in any way acquired by her after marriage.

The husband then being safe from the wife's ante-nuptial debts, is not liable for her married engagements if she can contract under the statute in respect of her separate estate, or if she has *no authority to contract* by virtue of the statute.

The wife is liable for her contracts entered into *dum sola* to the extent of her separate estate, but not to those made during her marriage, unless she has power by statute to contract in respect of her separate estate, and then only to the extent of that estate.

In this particular case the contract was entered into by the female defendant since her marriage. It is not, therefore, a case expressly provided for by the statute, as contracts of married women are provided for by the Imperial Act 20 & 21 Vic. ch. 85, secs. 25 & 26, after a judicial separation has been pronounced.

The question then is, has a married woman, having separate estate, authority to contract in respect of that estate?

There are two kinds of separate estate, real and personal. The statute deals very differently with them.

The real estate which is called her separate property she cannot sell or lease without the consent and concurrence of her husband. It is not therefore properly separate estate at all, as it wants the principal element and characteristic of it, the power of disposition over it without the control

or interference of her husband just as if she were still a single woman.

The 25th section of the act declares that over both real and personal estate the married woman shall have complete dominion, free from her husband's debts and obligations, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried, any law, usage, or custom, to the contrary notwithstanding.

This section would probably have been held to have conferred upon the wife as ample powers to deal with her real, as well as with her personal estate, in all respects as she could have dealt with it by the doctrines of the Court of Equity before the passing of this act, in case it had been settled to her separate use. But by an act 22 Vic. ch. 35, following immediately after the Married Women's Separate Estate Act, ch. 34 of the same session, there is contained a section, 6, which alters most materially the powers of married women over their real property which has been called separate estate.

The sec. of ch. 35, is as follows:—"The requirements heretofore necessary to give validity at law to a conveyance by a married woman of any of her real estate, shall continue to be necessary for that purpose with respect to deeds of conveyance executed after the passing of this act, notwithstanding anything contained in this act *or in any act which has been or may be passed during the present session of parliament*. But this section shall not affect any other remedy at law or in equity which a purchaser or other person may have upon any contract or deed of a married woman which may be hereafter executed in respect of her real estate."

This section, all but the italics, which I have marked, is now sec. 15 of ch. 85 of the Consol. Stat. U. C.

The effect of it is to prevent a married woman from dealing with her property as separate estate, and, as a consequence, to prevent her from charging it or contracting in respect of it: *Royal Canadian Bank v. Mitchell and Wife* (14 Grant, 412); *Emrick v. Sullivan* (25 U. C. R. 105.)

This is the effect of it at law at any rate, though I must confess I am quite unable to comprehend the meaning of the proviso. It practically nullifies the beneficial purpose of the statute, which was introduced no doubt to give effect to the report and recommendation of the society for amendment of the law made in 1856, and published in the *Law Magazine*, Vol. I., N. S., 391, and in other contemporaneous publications.

It is there said, p. 406, "Your committee, on the grounds above set forth, recommend that a law of property as to married women should be based on the following principles : —1. The common law rules which make marriage a gift of all the woman's personal property to the husband to be repealed. 2. Power in married women to hold separate property by law as she now may in equity. 3. A woman marrying without an ante-nuptial contract to retain her property and after acquisitions and earnings as if she were a *feme sole*. 4. A married woman, having separate property, to be liable on her separate contracts, whether made before or after marriage. 5. A husband not to be liable for the ante-nuptial debts of his wife any further than any property brought to him by his wife under settlement extends. 6. A married woman to have the power of making a will ; and on her death intestate, the principles of the Statute of Distributions as to her husband's personalty, *mutatis mutandis*, to apply to the property of the wife. 7. The rights of succession between husband and wife, whether as to real or personal estate, to curtesy or dower, to be framed on principles of equal justice to each party."

The statute no doubt fetters the separate estate even in a court of equity, for by the fourth section no conveyance or act of the wife can affect the husband's right to curtesy, and it may even fetter it further.

She had unlimited power before the act to deprive her husband of his curtesy, because she dealt with her property in equity in all respects as if she were a *feme sole*.

There is no such limitation as to separate personal property, and if she is to hold it "free from his debts and

obligations" (under the 2nd section) "contracted after the 4th May, 1859, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried; any law, usage, or custom, to the contrary notwithstanding," she must have the right and power to deal with it just as she pleases, and to contract in respect of it as an incident and necessary consequence of her interest in and authority over the subject property.

I need not quote the language of the different judges: it is sufficient to refer to some of their decisions: *Tullett v. Armstrong*, (1 Beav. 1, 4 M. & Cr. 377); *Vansittart v. Vansittart*, (4 K. & J. 62); *Woodward v. Woodward*, (9 Jur. N.S. 882); *Matthewman's case*, (L. R. 3 Eq. 781); *Butler v. Cumps-ton*, (L.R. 7 Eq. 16); *Taylor v. Meads*, (11 Jur. N.S. 166.)

She may even contract with and sue her husband: *Cannel v. Buckle*, (2 P. Wms. 243); *Griffith v. Hood*, (2 Ves. Sen. 452); *Woodward v. Woodward*, (9 Jur. N. S. 882); *Vansittart v. Vansittart*, (4 K. & J. 62.)

After a protection order to secure the wife's separate earnings, she acts alone as if a single woman: *Bathe v. Bank of England*, (4 Jur. N. S. 505); *In re Kingsley*, (4 Jur. N. S. 1010.)

She may after such order be sued alone, without her husband: *Rudge v. Weedon*, (4 De G. & J. 216, 5 Jur. N.S. 723); *Thomas v. Head*, (2 F. & F. 88); *In re Rainsdon*, (5 Jur. N. S. 55.)

And such an order is a bar to an action brought against the husband in respect of those claims which the wife might be sued for: *Tempany v. Hakewill*, (1 F. & F. 438).

If the wife could not by suit protect her separate estate or earnings from and against her husband's wrongful interference with or appropriation of them, her separate estate or any order of protection would be a farce. It is against him and his acts that the protection is needed. The doctrine of separate estate being established, it must, as Lord Chancellor Westbury said in *Taylor v. Meads*, "be consistently followed to its legitimate consequences," which embraces the right to contract with respect to it, and to dispose of it in any manner she pleases.



In England a woman having a protection order may, by the express language of the statute, sue her husband or any of his creditors, or any one claiming under him, if he seize or detain her protected property, and she not only may recover the property but also double its value.

This provision as to suing the husband may have been put in the statute from extreme caution, or because she was thereby enabled to recover a special penalty against him. The authority to sue him was and is complete in equity by reason of the separate estate, which creates an independent *status* of the wife, and if this separate estate be established at law, it carries with it the same rules prevailing in the court whose beneficial procedure and doctrine have been extended as part of the general law of the land.

I have no doubt that in respect of the personal separate estate of the wife she can contract in all respects as a *feme sole*, because she has the absolute disposing power over it. *Chamberlain v. McDonald* (14 Grant, 447), is I think to this effect also.

The property is bound by the general engagements contracted in respect of such estate, though no reference is made in the course of the contract to that estate. There is some difference of opinion whether the real estate is bound to the like extent, without writing, by the contracts of the wife as personal estate is, but there is no doubt that the personalty is bound without writing: *Johnson v. Gallagher*, (3 De J. F. & J. 494, 7 Jur. N. S. 273), per Lord Justice Turner; *Butler v. Cumpston*, (L.R. 7 Eq. 16); *Matthewman's case*, (L.R. 3 Eq. 784); *Shattock v. Shattock*, (L.R. 2 Eq. 182); *Murray v. Barlee*, (3 M. & K. 223); *Owens v. Dickenson*, (Cr. & Ph. 53); *Vaughan v. Vanderstegen*, (2 Drew. 183).

If the wife be liable for the claim in this cause, the declaration, I think, shews a contract made by her in respect of her separate estate, and for which separate estate such as can be made liable should be alone liable for it. The declaration on common law principles should disclose a perfect cause of action. It does this by shewing that the wife had separate estate and made the contract in respect of it.

I do not think it is necessary to aver there is separate estate liable for it; because she may happen to acquire property hereafter, and that will become subject to the payment of the debt if the judgment be obtained against her.

In proceedings against unincorporated insurance companies the declaration sets out, when the fact is so, that the insured is to be paid out of the funds of the company, but there is no averment made that there are funds to meet the payment: *Gurney v. Rawlins*, (2 M. & W. 87.)

I do not see on what ground the husband is sued. He must be joined when the debt was contracted before marriage, as before stated, but there is no provision that he is to be sued for debts incurred by her after marriage.

It appears to me therefore that the wife would, if sued alone, be liable to the extent of such part of her separate estate as can be attached for the cause of action set out in the declaration; but that the husband is not a proper party to the action.

Holding the wife individually liable is carrying out the enactments of the statute to their legitimate consequence. Potentially she could contract at law before the passing of the act, through the intervention of trustees: *Haselinton v. Gill*, (3 T. R. 620, n); *Jarman v. Woollaton*, (3 T. R. 620); *Carne v. Brice*, (7 M. & W. 183).

By this statute she can do so alone, without the aid of trustees, and responsibility is the inevitable consequence of her legally authorized acts. See the numerous cases collected in *Williams on Executors*, 6th ed., 59, and in *White & Tudor's Leading Cases in Equity*, 3rd ed., vol. I., 435, and subsequent pages, in commenting on *Hulme v. Tenant*, (1 Bro. C.C. 16.)

*Kraemer v. Gless* (10 C. P. 470), is utterly opposed to the opinion I have expressed. It was there decided that the statute does not alter the power of a married woman to make contracts, and that she was not enabled to bind herself while a *feme covert* more than she could do before the statute was passed.

In my view, the old policy of the common law was purposely subverted, and the enlightened system of law applicable to the separate estates of married women as administered in courts of equity was, in every particular, extended to the general law, and substituted for the harsh and unreasonable rules of feudal times.

I cannot understand why a wife is not to have the absolute rights of property, with all the incidents and responsibilities of and resulting from ownership, when the legislature has declared she shall have it (her personal property at any rate), in as full and ample a manner as if she were sole and unmarried, and to make it more emphatic, has added, "*any law, usage, or custom, to the contrary notwithstanding.*"

The mental and moral capacity of the wife were never questioned, for she was allowed to perform many acts requiring ability, discretion, and judgment, during her coverture. She could execute a power disposing of property of unlimited value according to her own discretion, or act as agent and attorney for another in all matters of business requiring skill and judgment, as well where it was in the business of another as where it was in her own business, as in dealing with property settled to her separate use. She could perform a condition without the concurrence of her husband, as to convey an estate to J. S., which was devised to her on condition of so conveying; and she could make a will of her personalty with her husband's consent. She could also make a will as executrix against his consent, and she had absolute power to act as a *feme sole* during the exile or transportation of her husband.

Before her marriage she could fill a great variety of offices: see *The King v. Stubbs* (2 T. R. 395-397, and *Co. Lit.* 326). The legal fiction was that "Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognised than is the *cestui que trust* or the mortgagor, the legal estate, which is the only estate the law recognizes, being in others,"—Per Lord Brougham, C., in *Murray v. Barlee* (3 M. & K. 220.)

It was to establish her individual entity, and to attach those rights to it in law which she was in fact capable of exercising, that led to the interference of the legislature. It is our duty to give effect to a statute which was so manifestly intended to have been the Married Women's Bill of Rights.

I am of opinion the personal separate estate is at the complete disposal of the wife in this country, as it is at her disposal in the courts of equity in England.

And I am of opinion that a wife may contract in respect of her real as well as of her personal separate estate, although she cannot, by any direct act of her own, charge or dispose of it without the consent of her husband.

The effect of such a contract will be to bind her present or future separate personal property, and I am not satisfied it will not bind her real property also. It may bind her real property, firstly, because the Imperial Act 5 Geo. II. ch. 7, makes real estate liable as goods and chattels for debts, and by the like process; and, secondly, because the restrictive clauses in ch. 85, sec. 15, and in ch. 73, sec. 4, apply only to conveyances and acts of the wife, and not to judgments recovered adversely to or in good faith against her. Her position in this respect may be likened to that of a tenant for years who is restrained from alienating. The provision applies only to the acts of the tenant, and not to those transfers which take effect by operation of law, as by bankruptcy or sale on execution.

The giving of a warrant of attorney for the *bonâ fide* purpose of a judgment being entered up against the debtor and his property seized, was held to be no breach of his covenant as lessee not to encumber or charge the property demised or the term granted, even under the 1 & 2 Vic. ch. 110, sec. 13, which was similar in its effect to the Consol. Stat. U. C., ch. 89, secs. 48, 49 while these provisions were in force, so long as it was not given with the object of evading the restriction: *Croft v. Lumley* (4 Jur. N. S. 903 H.L., 6 H.L. Cas. 672); *Doe dem Mitchinson v. Carter* (8 T. R. 57, 300.)



I am not able to adopt the judgment of the court in *Kraemer v. Gless*. It appears to me, and I need not say that I express and mean to express myself with all respect for the very learned and able judges who concurred in that judgment, that it is a judgment opposed to the object and principle of the statute; and as it is the only decision upon the act, and the act introduces a branch of law to which we have not before been accustomed, I think I am warranted by the course taken in many other cases under similar circumstances, when I entertain a very strong opinion myself, to deliver that opinion, although it differs from a previous decision.

It is only in peculiar instances this should be done, for the general rule is undoubtedly to follow an adjudicated case by a court of equal authority; but I consider this to be a peculiar case, and to justify me in following precedents applicable under the like circumstances.

In my opinion judgment should be given for the defendants, because the husband should not have been joined as a defendant; but on the general question my opinion is in favour of the plaintiff.

*Judgment for defendants.*

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# A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

## THE COURT OF QUEEN'S BENCH,

FROM MICHAELMAS TERM, 32 VICTORIA, TO EASTER TERM, 32 VICTORIA.

### ACCIDENT.

*See* NEGLIGENCE—TROVER, 2.

### ACCORD.

*See* SATISFACTION.

### ADULTERY.

*And cruelty of husband, how far a defence in crim. con.*

### AFFIDAVIT.

*Of bona fides.*—*See* CHATTEL MORTGAGE.

### AGREEMENT.

*See* CONTRACT.—SALE OF GOODS.  
—SALE OF LAND.—WORK AND LABOUR.

### ALTERATION.

*See* BILLS OF LADING AND WAREHOUSE RECEIPTS, 1.

### APPEAL.

*See* COUNTY COURTS, 1.—RIGHT TO BEGIN.

*In criminal cases.*—*See* CRIMINAL LAW, 2.

### APPEARANCE.

*Proceedings in replevin as regards appearance are regulated by the Replevin Act, C. S. U. C. ch. 29, not by the C.L.P.A.*—*See* REPLEVIN, 1.

### ARBITRATION AND AWARD.

*Reference—Construction of as to matters referred—Entering judgment on award.*—At nisi prius a certain question of fact in a cause was left to the jury, a verdict was taken for 1s., and the other questions involving matters of account, it was ordered that ‘the plaintiff’s claim in this cause, and all matters in difference between the parties in this cause, except the question decided by the jury, be referred to P. L., with power to increase the verdict

or order a verdict to be entered for the defendant," who had pleaded a set-off. On motion against the award, it was objected that this was a reference of all matters in dispute between the parties, and therefore unauthorized.

*Semble*, that it referred only the matters in dispute in the cause; but it was clear that nothing more was intended or had been considered by the arbitrator, and no objection had been made to the order; and *Held*, therefore, that if necessary the order would be amended.

Where a verdict is taken and the award not made until after the next term, the plaintiff need not wait to enter his judgment until after the first four days of the term following the award.—*Blanchard v. Snider*, 210.

#### ASSENT.

*To irregular assignment of dower.*  
—See DOWER.

#### ASSESSMENT.

See TAXES.

#### ASSIGNMENT.

*Of dower.*—See DOWER.

See INSOLVENCY, 1, 2, 3.

#### ASSURANCE.

See INSURANCE.

#### ATTACHMENT.

See MALICIOUSLY SUEING OUT ATTACHMENT.

#### ATTEMPT.

*To commit burglary, evidence of.*  
—See CRIMINAL LAW, 4.

#### AWARD.

See ARBITRATION AND AWARD.—  
PARTNERSHIP.

#### BANKS.

See BILLS OF LADING AND WAREHOUSE RECEIPTS.

#### BANKRUPTCY.

See INSOLVENCY.

#### BILL IN CHANCERY.

See PARTNERSHIP.

#### BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Mining Co.*—C. S. C. ch. 63, sec. 57—*Bills of Exchange.*—A mining company incorporated under Consol. Stat. C. ch. 63, sec. 57, has not, as a necessary incident, the right to draw, accept or endorse bills of exchange for the purposes of their business; and the power of "selling or otherwise disposing of their ores as the company may see fit," in their articles of association, will not give such right by implication.

Bills directed to the secretary of the company, and so describing him, are in effect drawn on the company, and authorize him to accept on their behalf, if he has authority to bind them; and it is unnecessary to put the seal of the company to the acceptance.

His authority, and the power of the company to accept, are put in issue by a traverse of acceptance by the company.

Where there is no mention in the bills or acceptances of the amount of the capital stock of the company, the trustees, under Consol. Stat. C.



ch. 63, sec. 57, are personally liable; but only where but for such omission the company would have been liable, which here they would not have been.—*Gilbert v. McAnany et al.*, 384.

*No penalty can be recovered for not affixing stamps to a promissory note, the consideration of which is illegal.*]  
—See STAMPS.

See BILLS OF LADING AND WAREHOUSE RECEIPTS. — LIMITATIONS, STATUTE OF.

## BILLS OF LADING AND WAREHOUSE RECEIPTS.

*Bill of lading—Endorsement to bank—31 Vic. ch. 11—Alteration—Estoppel.*—B. held a bill of lading in duplicate for 100 barrels of flour on board the steamer “Corinthian,” consigned to his order at Kingston. He sold the flour to H. at \$7 per barrel, and went with him to the plaintiffs’ bank, where he endorsed the two bills in blank, and gave them to H. H. attached one to his draft for \$500, which he discounted, and applied the proceeds towards paying B. The duplicate bill of lading H. kept, and the next day he got B. to write on it, over his endorsement, “Deliver to order of H.” This duplicate got into the possession of defendants at Kingston, not endorsed, and they obtained the flour there from the wharfinger by representing that they had B.’s order. Plaintiffs brought trover, and the jury found that there had been no sale of the flour by H. to defendants. On objections taken to the plaintiff’s title—

*Held* 1. That the bill of lading was valid, though signed by the purser, not by the master.

2. *Morrison, J.*, dissenting—that the endorsement of the bill of lading in blank was sufficient, without specifying that it was endorsed to secure the note discounted.

3. That the alteration, by converting the general into a special endorsement, was immaterial.

4. That under the circumstances, the endorsement by B. to the bank was sufficient without H.’s endorsement, either because B. was in truth the owner, or because H. having so represented to the plaintiffs, he and defendants claiming under him were estopped.

5. That the plaintiffs were entitled to recover the full value of the grain, not merely the \$500 advanced by them.—*The Royal Canadian Bank v. Carruthers et al.*, 578.

2. *Warehouse receipts—Con. Stat. C. ch. 54.*—The plaintiffs on the 20th September, received a note for \$5800, payable to and endorsed by L., with L.’s warehouse receipt for wool attached, which they discounted on the 4th October, 1867. On the 21st October, \$1179 only remaining due, they took a note for this sum from M., the maker of the previous note, with his receipt for some wool, in addition to a receipt from L. for what remained of the wool covered by L.’s previous receipt. It was not discounted however on that day, because M. did not pay the discount, and on the 5th December, M. made another note for the same sum, at ten days, in place of it, which was discounted with the same two warehouse receipts attached. It was renewed on the 24th, with the same receipts, and

not being paid, the plaintiffs in April sold the wool, through a broker, who was unable to get it; and they thereupon replevied on the 9th May.

*Held*, following *Bank of British North America v. Clarkson*, 19 C P. 182, that the warehouse receipts being taken directly to the Bank, and not by endorsement, were not within the statute, *Consol. Stat. ch. 54, sec. 8*, and that the plaintiffs therefore could not recover.

*Richards, C. J.*, and *Adam Wilson, J.*, however, dissented from that decision, though following it in accordance with the established practice.

*Held*, also, that the transaction of the 5th December might be considered as a new one, and that the plaintiffs therefore had not held the wool more than six months, so as to defeat their title, under *sec. 9*.

If they had, defendants might shew that fact under a plea of not possessed.—*The Royal Canadian Bank v. Miller et al.*, 593.

## BOARD OF TRADE.

*Power to appoint official assignee.*]  
—See *INSOLVENCY*, 3.

## BRIDGE.

*Liability of municipal corporation for building so as to obstruct water-course.*]  
—See *MUNICIPAL CORPORATIONS*.

## BURGLARY.

See *CRIMINAL LAW*, 4.

## BY-LAW.

*To prohibit the sale of intoxicating liquors.*]  
—See *TEMPERANCE ACT*, 1864.

## CAPTION.

*In a record of conviction for felony.*]  
—See *CRIMINAL LAW*, 1.

## CARRIERS.

*Liability of railway company for luggage lost.*]  
—See *RAILWAYS AND RAILWAY COMPANIES*, 3.

## CERTIORARI.

*Selling liquor without license—Application for certiorari—Proof—Form of rule nisi.*]  
—On an application for a *certiorari* to remove a conviction of one J. B., for selling liquor without license—

*Held*, 1. That the rule *nisi* was properly entitled “In the matter of J. B.,” and that it need not state into which court the conviction was to be removed, for that this was sufficiently shewn by the entitling it in the court in which the motion was made.

2. That on such a charge it was for the defendant to shew his license, not for the informant to negative its existence. The *certiorari* was therefore refused.—*In the matter of John Barrett*, 559.

*An action brought in a county court beyond its jurisdiction, cannot be removed by.*]  
—See *COUNTY COURT*, 2.

See *REPLEVIN*, 2.

## CHALLENGES

*Of jurors.*]  
—See *CRIMINAL LAW*, 1, 2.

## CHATTEL MORTGAGE.

*Security against indorsements—Recital—Affidavit—Description of goods—Detinue—Mortgage given for money advanced at the time—*

*Damages.*]—A chattel mortgage under C. S. U. C. ch. 45, sec. 5, may be given as security against past or concurrent, but not against future, indorsements or liabilities. If it did not apply to past liabilities, then a mortgage to secure against them would not be avoided by the act for want of compliance with its provisions.

A recital that the plaintiff had endorsed three notes made by J., giving the dates, sums, and the time of payment, for the accommodation of J., and that J. had agreed to enter into the mortgage to indemnify and save harmless the mortgagee of and from payment of said notes, and from all liability or damage in respect thereof: *Held*, clearly sufficient.

An affidavit that the mortgage was made to secure the mortgagee against the payment of "such liability of" instead of *for* "the mortgagor" by reason of the notes: *Held*, sufficient.

The goods were described as all the goods in the house of the mortgagor, "in bed room No. 1, one bureau," &c., describing the articles in each room, and adding "all the hereinbefore described goods and chattels being in the dwelling house of the party of the first part, situate on Queen Street, in the town of Brampton; also one bay mare, one covered buggy," &c., "being on the premises of the party of the first part on said Queen Street; also the following goods and articles, being in the store of the party of the first part, on the corner of Queen and Main Streets, in the said town of Brampton, that is to say, 85 gallons of Vinegar," giving a long list, "and also the following goods, being of the stock-in-trade

of the party of the first part taken in the month of April last, that is to say, 16 pieces of tweed," &c.: *Held*, that all the goods were sufficiently described, for the last parcel of goods might be taken as described to be in the store.

Remarks as to the inefficiency of description of goods by locality.

Detinue is maintainable though defendant had not the goods when action brought; it is sufficient if he once had, and improperly parted with them.

*Held*, also, that the mortgage in this case, given under circumstances fully set out in 27 U. C. R. 244, was good as against creditors, the jury having found it to be *bonâ fide*; and that notice to the official assignee of the mortgagee's claim was immaterial.

The defendant having taken possession of the goods and premises as official assignee, and being sued by the mortgagee, claimed a deduction from the plaintiff's damages for rent, insurance, and taxes paid by him out of the proceeds of sales: *Semble*, that it should have been allowed only if due when he took possession; but this did not appear, and, under the circumstances, the court refused to interfere. *Mathers v. Lynch*, 354.

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## COMMISSION

*Of Oyer and Terminer, and General Gaol Delivery.*]—See CRIMINAL LAW, 1.

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## COMMON CARRIERS.

*Obligation of Railway Cos. as to luggage.*—See RAILWAYS AND RAILWAY COMPANIES, 3.



*Contract to carry by specified route*  
*—Deviation—Loss of goods by fire—*  
*Liability.]—See TROVER, 2.*

### CONFESSIONS

*See CRIMINAL LAW, 3.*

### CONSIDERATION.

*Forbearance, when a consideration*  
*for promise.]—See MORTGAGE.*

### CONTRACT.

*Privity of contract.]—See MONEY*  
*HAD AND RECEIVED.*

*See MARRIED WOMEN, 2.—SALE*  
*OF GOODS.—SALE OF LANDS.—*  
*TROVER, 2.—WORK AND LABOUR.*

### CONVERSION.

*See TROVER, 2.*

### CONVICTION.

*For taking a greater toll than is*  
*authorized by law.]—See TOLLS.—*

*For selling liquor without a license.]*  
*—See CERTIORARI.*

### CORPORATIONS.

*See BILLS OF EXCHANGE AND PRO-*  
*MISSORY NOTES.—MUNICIPAL COR-*  
*PORATIONS.*

### COSTS.

*Replevin—Costs.]—Held, affirm-*  
*ing Ashton v. McMillan, 3 P. R. 10,*  
*that in replevin full costs are not*  
*taxable without a certificate.*

At the trial in the County Court  
 a verdict was entered for defendant,  
 with leave reserved to move to  
 enter it for the plaintiff, and no  
 certificate was applied for. On

appeal a verdict was directed for  
 the plaintiff for 15s., and the Clerk  
 of the County Court taxed only  
 Division Court costs. The judge  
 refused a revision, and this court  
 would not interfere.—*In re Cole-*  
*man v. Kerr, 297.*

*See RIGHT TO BEGIN.*

### COUNTY COURTS.

1. *County Court appeals—Objec-*  
*tions to bond, &c.—Right of appeal.]*  
*—This court will not entertain ob-*  
*jections to the hearing of County*  
*Court appeals, unless such objec-*  
*tions appear or should properly*  
*appear upon the proceedings cer-*  
*tified They refused therefore to*  
*strike out an appeal entered, for*  
*objections to the form and amount*  
*of the bond, and to the sufficiency*  
*of the sureties and the affidavits of*  
*justification.*

Where defendants moved for a  
 non-suit on leave reserved, or for a  
 new trial, and the rule was made  
 absolute for a new trial on payment  
 of costs: *Held*, that they might  
 appeal from this decision as re-  
 fusing the nonsuit, and need not  
 first take out the rule absolute as  
 granted.—*Penton v. The Grand*  
*Trunk Railway Company of Canada,*  
*367.*

2. *Jurisdiction—Title to land—*  
*Certiorari.]—In replevin the de-*  
*fendants avowed under a distress for*  
*rent, to which the plaintiff pleaded*  
*that he did not hold the land as*  
*tenant, &c., as in the avowry*  
*alleged. Held, that the title upon*  
*this plea did not necessarily come*  
*in question, and that the record*  
*therefore did not shew a cause of*  
*action beyond the jurisdiction of*  
*the County Court.*



Where an action has been brought in the County Court beyond its jurisdiction, or when being rightly brought there the jurisdiction has been determined by matter of pleading or evidence, the whole proceedings are *coram non judice* and void, and they cannot be removed by *certiorari* into the Superior Court.—*O'Brien v. Welsh et al.*, 394.

### COVENANT.

*Absence of covenant to pay in mortgage.*—See MORTGAGE.

### CRIMINAL CONVERSATION.

*Crim. Con.—Separation by plaintiff's misconduct—How far a defence.*—To an action for criminal conversation the defendant pleaded,—1. That the plaintiff had been guilty of adultery with one L., by whom he had a child now living with him, and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence towards her, and finally put her away from him by force, and threatened to put her to death if ever she returned to him, so that she was in danger of her life, and did live apart from him permanently. 2. That the plaintiff's wife had, while so living apart from him, obtained an order for protection under the statute, after due notice to the plaintiff of her application therefor, which order was duly registered and is in full force.

*Held*, on demurrer, A. Wilson, J., dissenting, that the pleas shewed a good defence.—*Patterson v. McGregor*, 280.

### CRIMINAL LAW.

*Record of conviction for felony—Caption—Commission—Jury process—Challenges.*—The record of a conviction for murder set out, in the caption, that the indictment was found at a General Session of Oyer and Terminer, and General Gaol Delivery, before the Chief Justice of the Common Pleas, duly assigned and under and by virtue of the statute in that behalf duly authorized and empowered, to enquire, &c., setting out the authority to hear and determine as formerly given in commissions, but not to deliver the gaol. It was then stated, that at the said Session of Oyer and Terminer and General Gaol Delivery, the prisoner appeared and pleaded; and the award of venire was "therefore let a jury thereupon immediately come," &c. This record was returned to a writ of error directed "To our Justices of Oyer and Terminer for our county of C., assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies," &c. On error brought,

*Held*, that the authority of the justices sufficiently appeared, without any statement whether a commission had issued or been dispensed with by order of the Governor; for such courts are now held, not under commission, but by virtue of the statute, Consol. Stat. U. C. ch. 11, as amended by 29-30 Vic. ch. 40; and as the record sufficiently shewed the absence of any commission, it must be presumed that it seemed best to the Governor not to issue one.

*Seemle*, that if the court had been held by a Queen's Counsel or County Court Judge, it might have been necessary to shew

whether a commission had issued or not, as he would derive his authority from a different source in each of the two cases.

*Semble*, also, that if the caption had been defective, it might have been rejected altogether, under Consol. Stat. C. ch. 99, sec. 52.

It was objected that the only authority shewn being that of Oyer and Terminer, the award "therefore let a jury thereupon immediately come," was unauthorized, and a special award of *venire facias* was requisite; but, *Held*—assuming, but not admitting, that in England there is a difference in this respect between the power of justices of Oyer and Terminer and of Gaol Delivery, and that the record shewed no authority to deliver the gaol—that in this country, by the Jury Act, Consol. Stat. U. C. ch. 31, both have the same powers, the general precept to summon a jury being issued by both before the assizes.

The prisoner desired to challenge one S., one of the jurors called, for favor, alleging sufficient cause. The judge ruled that he must first exhaust his peremptory challenges, and this point was raised by plea and demurrer, and formally decided. The entry on the record then was, that in deference to the judgment the challenge was taken and treated by the prisoner, and by the Attorney General, as a peremptory challenge for and on behalf of the prisoner. Afterwards, having exhausted his twenty challenges, including S., he claimed to challenge peremptorily one H., contending that by the erroneous ruling he had been compelled to challenge S. peremptorily, and should not be obliged to count him as one of the twenty. This

was also entered of record and decided against him.

*Held*, 1. That the prisoner was entitled to challenge for cause before exhausting his peremptory challenges: that error would lie for the refusal of this right; and that had S. been sworn there must have been a *venire de novo*;—but, 2, *Morrison, J.*, dissenting, That by the peremptory challenge of S., which excluded him from the jury, the first ground of error was removed; and that error on the second challenge could not be supported, for the prisoner had in fact had twenty peremptory challenges, and the peremptory challenge of S. being in deference to the ruling of the judge did not make it the less a peremptory challenge.—*Whelan, plaintiff in error, v. The Queen, defendant in error*, 2.

2. *Court of Error and Appeal—Jurisdiction.*—Error, as distinguished from appeal, will lie in a criminal case from the Court of Error and Appeal to the Queen's Bench, and the writ of error may be as nearly as possible in the form of a writ of appeal given by the orders of the court published in 1850.

Appeals, under Consol. Stat. U. C. ch. 13, sec. 29, as distinguished from error, are in criminal cases confined to such as arise under the act respecting new trials in criminal cases, 20 Vic. ch. 61, now Consol. Stat. U. C. ch. 113.

In construing the Consolidated Statutes, the court may refer to the original enactments in order to assist in arriving at a right conclusion.

The prisoner having brought error from the judgment of the Court of Queen's Bench upon the questions arising out of the chal-

lenges to jurors (see the last case) such judgment was affirmed.—*Van Koughnet, C., Hagarty, C. J. C. P., Spragge, V. C., and Morrison, J.,* dissenting.—*Whelan v. The Queen*, 108.

3. *Murder—Evidence—Credibility of witnesses, &c.*—On a trial for murder, the Crown having made out a *primâ facie* case by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased without the prisoner's knowledge, and under circumstances detailed, which would probably reduce her guilt to manslaughter.

*Held*, that the learned judge was not bound to tell the jury that they must believe this witness in the absence of testimony to shew her unworthy of credit, but that he was right in leaving the credibility of her story to them; and if from her manner he derived the impression that she was under some undue influence, it was not improper to call their attention to it in his charge.

As to certain threats alleged to have been uttered by the prisoner—*Held*, that they were clearly admissible, and if undue prominence was given to them in the charge, the attention of the learned judge should have been called to it by the prisoner's counsel.

Remarks as to alleged misdirection, in not directing that the jury must be satisfied not only that the circumstances were consistent with the prisoner's guilt, but that some one circumstance was inconsistent with his innocence.

The prisoner's witness having stated that death was caused by two blows from a stick of certain

dimensions—*Held*, that a medical witness previously examined for the Crown was properly allowed to be recalled to state that, in his opinion, the injuries found on the body could not have been so occasioned.

Remarks as to evidence of confessions, and an objection that the whole statement was not given.

And as to the effect in criminal cases of a belief by the jury that false evidence has been fabricated for the prisoner, or false answers to questions.—*Regina v. Jones*, 416.

4. *Attempt to commit burglary—Evidence of.*—The prisoners being indicted for an attempt to commit burglary, it appeared that they had agreed to commit the offence on a certain night, together with one C., but C. was kept away by his father, who had discovered their design. The two were seen about twelve that night to come within about thirteen feet of the house, towards a picket fence in front, in which there was a gate; but without entering this gate they went, as was supposed, to the rear of the house, and were not seen afterwards. Afterwards, about two o'clock, some persons came to the front door and turned the knob, but went off on being alarmed, and were not identified.

*Held*, that there was no evidence of an attempt to commit the offence, no overt act directly approximating to its execution: and that a conviction therefore could not be sustained.—*The Queen v. McCann and Jevons*, 514.

## DAMAGES.

*Action by mortgagee for taking goods mortgaged—Claim by defend-*



ant to deduct insurance paid, &c.].—  
See CHATTEL MORTGAGE.

Contract to carry goods by specified route—Deviation—Loss of goods by fire—Measure of damages.].—See TROVER, 2.

### DEED.

By married woman.].—See MARRIED WOMAN.

### DEED OF COMPOSITION.

See INSOLVENCY, 1.

### DESCRIPTION OF GOODS.

See CHATTEL MORTGAGE.

### DESCRIPTION OF LAND.

Patent—Description of land—*Falsa demonstratio*—Statute of limitations.].—The Crown in 1808 granted the continuation of lots 12 and 13, in the first concession of Gosfield, by two separate patents, describing each as containing 100 acres more or less, and giving metes and bounds, beginning at a certain distance from the south-east angle of each lot on Lake Erie, and extending a fixed distance north, not saying more or less. The front portion had been granted, it was said, in 1790, and it was not shewn whether the line between the first and second concessions had been run in 1808, or at what time. The distance given would carry the land into the second concession, and the defendant claimed the land there covered by the metes and bounds as against the plaintiff, who claimed the lots in the second concession under a later patent.

*Held*, that only land in the first concession would pass by the patents of 1808; for this, in the absence

of any proof as to the concession line, was evidently the intention of the crown, and the description by metes and bounds must be rejected as erroneous.—*Wigle v. Stewart*, 427.

### DETINUE.

Is maintainable though defendant had not the goods when action brought.].—See CHATTEL MORTGAGE.

### DISTRESS.

*Distress damage feasant*.].—The plaintiff's horse escaped from his stable and got into defendant's pasture field, but was immediately pursued by one M., the plaintiff's son-in-law, who saw it escape, and was leading it out of defendant's field, when defendant seized and detained it. The plaintiff replevied, and defendant avowed as for distress damage feasant.

*Held*, that the horse, under the circumstances, was not distrainable; and the judgment of the county court, upholding a verdict for defendant, was reversed.—*McIntyre v. Lockridge et al.*, 204.

See TAXES.

### DIVISION COURT.

*Unsettled account—Jurisdiction*.].—The plaintiff in a Division Court may recover \$100, being the balance of an unsettled account not exceeding \$200, but when the whole account exceeds that sum there is no jurisdiction.

An unsettled account means an account the amount of which has not been adjusted, determined, or admitted by some act of the parties.

The plaintiff here sued for \$84, being the balance due for rent of



premises occupied by defendant as his tenant for several years, at \$160 a year, after deducting the payments made from time to time.

*Held*, not within the jurisdiction.—*In re Hall v. Curtain*, in the Division Court, 533.

### DOWER.

*Assignment of—Assent to irregular assignment—Teste of writ.*—A writ of assignment of dower is a writ of execution, within the 249th section of the C. L. P. Act, and may therefore be tested on the day on which it is issued.

An assignment of dower by the sheriff must be by metes and bounds. Where two lots fronted on a river, and were therefore irregular in shape, and the sheriff assigned the east third of one and the west third of the other, making no survey and giving no further description, the assignment was held insufficient.

But neither livery of seisin nor writing are necessary to an assignment; and where the tenant of the freehold, after such assignment, gave notice to the demandant to make her share of the fence between those portions which had been assigned by the sheriff as her dower in the said lots and the defendant's portion: *Held*, that this was evidence of an assent by him to the assignment as made, which was therefore sufficient.—*Fisher v. Grace*, 312.

### EJECTMENT.

*An objection that the title relied on is not the same as that mentioned in the notice cannot be taken advantage of after trial.*—See TITLE.

*Proof of title—Estoppel by offers to purchase.*—See TITLE.

### EQUITABLE PLEADING.

See SALE OF LANDS—SATISFACTION.

### ERROR

*As distinguished from Appeal, will lie in a criminal case from the Court of Error and Appeal to the Queen's Bench.*—See CRIMINAL LAW, 2.

### ESTOPPEL.

*Against denying title, by offers to purchase.*—See TITLE.

*Against denying ownership of goods.*—See BILLS OF LADING AND WAREHOUSE RECEIPTS, 1.

See REPLEVIN, 2.

### EVIDENCE.

*Of agreement to hire.*—See WORK AND LABOUR.

*Of assent to irregular assignment of dower.*—See DOWER.

*Of attestation of will.*—See WILL.

*On a charge for selling liquors without license, it is for defendant to shew his license, not for the informant to negative it.*—See CERTIORARI.

*Of attempt to commit burglary.*—See CRIMINAL LAW, 4.

*Of murder.*—See CRIMINAL LAW, 3.

*Of negligence.*—See NEGLIGENCE.

*Proof of title.*—See TITLE.

See TROVER, 1.

### EXECUTORS.

See WILL.

### EXECUTION.

See DOWER.

## FALSA DEMONSTRATIO.

See DESCRIPTION OF LAND.

## FENCES.

*Obligation of railway companies to fence.*—See RAILWAYS AND RAILWAY COMPANIES, 1.

## FIRE.

*Loss of goods by—Liability of carrier.*—See TROVER, 2.

## FRAUD.

*Misrepresentation on sale of land.*—See SALE OF LAND.

## FRAUDULENT ASSIGNMENT

See INSOLVENCY, 1, 2, 3.

## FRAUDULENT CONVEYANCE.

*Fraudulent conveyance*—13 Eliz. ch. 5.]—A sale and conveyance for valuable consideration, paid at the time, of the grantor's interest in certain land to his father-in-law, made in 1857, was impeached as being fraudulent as against creditors, under the 13th Eliz. ch. 5. The learned judge asked the jury whether the deed was a *bonâ fide* transaction, a deed made for a valuable consideration, or whether it was fraudulently made, as a mere scheme or contrivance for the purpose of delaying, hindering, or defrauding creditors, in which latter case he said it would be void; and he refused to add, that if they believed the consideration was paid to cover the property and protect it from creditors, they should find against the deed.

*Held*, affirming the judgment of the Queen's Bench, that the charge was unobjectionable, being substantially in accordance with Wood v. Dixie, 7 Q. B. 892, which was recognized and followed.

*Spragge*, V.C., dissented, on the ground that the jury should have been told, that although they might find that the conveyance was for value, yet if the intent and purpose of both grantor and grantee was to defraud creditors, the deed would be void; and that this was not the effect of the charge.—*Smith v. Moffatt, et al. (In Appeal)*, 486.

## FRAUDULENT PREFERENCE.

See INSOLVENCY, 3.

## HIGHWAY.

*Obstruction by snow—Liability of Road Co.*—See ROAD COS.

## HUSBAND AND WIFE.

See MARRIED WOMEN.

## IDENTITY.

*Averment of in pleading.*—See PLEADING.

## INSOLVENCY.

1. *Deed of composition.*—A deed of composition and discharge under sec. 8, sub-sec. 4, of the Insolvent Act of 1864, purporting to be between the insolvents of the first part, and a majority of the creditors of \$100 and upwards, of the second part, was *Held* invalid, because not executed by the insolvents.

Such a deed to be operative must provide for the separate creditors of each partner, as well as those of the firm.

A purchase of goods by persons unable to pay their debts in full is not fraudulent within sec. 8, unless such inability is concealed from the creditor with intent to defraud him.—*In the Matter of Garratt & Co., Insolvents*, 266.

2. *Act of 1864—Sec. 8, sub-sec. 4—Fraudulent transfer.*—Knox being indebted to one Kyle, and Kyle to the defendant, it was arranged that defendant should take Knox as his debtor, defendant crediting Kyle with the amount which Knox owed to Kyle, and Kyle discharging Knox; and Knox accordingly gave defendant his note for the amount. This took place within thirty days before Kyle made an assignment in insolvency, and his assignee brought trover for the note, contending that the transaction was avoided by sec. 8, sub-sec. 4, of the Insolvent Act of 1864; but

*Held*, that he could not recover, for the note never was the insolvent's property, and so never passed to the assignee; and even if it was a transfer or payment by Kyle within the act, and so avoided, this would not entitle the plaintiff to the note.—*McGregor v. Hume*, 380.

3. *Act of 1864—Appointment of Assignee—Security by him—Fraudulent preference and payment—Sec. 8, sub-secs. 4, 5.*—*Held*, that the London Board of Trade, which was an organized body in operation before the Insolvent Act of 1864, had power, though not incorporated, to appoint official assignees

under that act; and that such appointment was properly made by resolution.

The transmission of a copy of such resolution to the clerk of the county court, under sec. 4, is directory only; and the omission to send it will not invalidate the appointment.

A bond to W. S., of &c., President of the Board of Trade of the city of London, to be paid to him as president of the said board, his successors and assigns, and executed by the sureties, but not by the assignee: *Held* sufficient, under sec. 4, sub-sec. 2.

*Quære*, whether a defect in such security, or the absence of it altogether, would avoid the assignee's appointment.

On the 18th October, the insolvent sold goods to one C., taking his note for the price, which on the same day was taken by C., and by the defendant, and one of the insolvents, to a bank, and there left to be applied in payment of notes made by the insolvents and endorsed by defendant. On the 20th the insolvents made a voluntary assignment, being pressed to do so by threats of compulsory liquidation.

*Held*, that the transaction, being within 30 days before the assignment, was a transfer to defendant by way of payment, giving him an unjust preference, and therefore void under sec. 8, sub-sec. 1; that there was evidence also that it was made by the insolvents when unable to pay, with a person knowing such inability, and therefore made with intent to defraud their creditors; and that it was also a payment to defendant under sub-sec. 5.

*Held* also, *Morrison, J.*, doubting, that under sub-secs. 4 and 5, the assignee might recover in trover for the goods sold, though before his title accrued the note had been discounted and the proceeds applied on defendant's endorsements. — *Churcher, assignee, v. Cousins*, 540.

## INSURANCE.

1. *Policy—Addition to premises insured—Increase of risk—Pleading—Surplusage.*]—A policy provided that it should be avoided by any additions made to the building insured, unless written notice thereof was given to the secretary and the consent of the board of directors thereto endorsed on the policy, signed by the president and secretary. Defendants in their plea stated an addition without notice or consent, by which they alleged that the premises became materially altered so as to increase the risk. The plaintiff took issue.

*Held*, that the latter averment being surplusage need not be proved, and that defendants were entitled to succeed on shewing the addition without notice, although the jury found the risk not increased by it.

There was also an equitable replication of parol waiver by an agent duly authorized, but his authority was not proved; and *semble*, that such waiver could be no answer. — *Lindsay v. The Niagara District Mutual Fire Insurance Company*, 326.

2. *Fire insurance—Change of occupation—Increase of risk—Carpenters and painters—Pleading.*]—Defendants insured two buildings, each for different sums, by a policy which provided that in case any

alteration or addition should be made in or to any risk, whether by the erection of apparatus for producing heat, or the introduction of articles more hazardous than allowed, or change in the nature of the occupation, or in any other manner whatsoever by which the degree of risk was increased, and an additional premium would be required, without notice and allowance thereof, the policy should be void.

A plea setting up a defence under this as to one building, alleged that an alteration was made in the risk, within the meaning of the condition, by the plaintiffs having suffered a change in the occupation of the building, and by the introduction therein of painters who worked therein and thereon at their trade; and that another alteration was made in said risk by the plaintiffs having permitted a change in the occupation of the other building insured, which adjoined building No. 1, and by the introduction therein of carpenters who worked therein at their trade — whereby, and by means of such alterations, the risk on said building No. 1 was increased, &c.

*Held*, that the pleas were good; that the means by which the risk was increased could not be rejected as surplusage, as defendants contended, but that what was alleged as to the change of occupation might have increased it, and whether it did so or not, was for the jury.

A mere temporary introduction of painters and carpenters, for repairs, &c., would not avoid the policy. *Quære*, therefore, whether in this respect the plea was sufficient. *Semble*, that it was, because the court could not judicially know whether what was alleged on that point could increase the risk; but



it was suggested that the plaintiffs should reply specially the circumstances under which the painters and carpenters were introduced.

*Quære*, as to the distinction between change "in the occupation" and in the "nature of the occupation" of a building.—*The Ottawa and Rideau Forwarding Company v. The Liverpool and London and Globe Insurance Company*, 518.

3. *Condition as to incumbrances—Construction.*—One of the conditions of an insurance policy was, that persons sustaining loss should declare on oath whether any, and what other, insurance or incumbrance had been made on the insured property. The notice given said nothing about incumbrances, and a mortgage was proved, made by the plaintiff *about a month before the policy*.

*Held*, that though this mortgage was not within the condition, yet the plaintiff could not recover, for he had not complied with the condition, which required him to declare whether there was or was not any incumbrance, and such compliance was a condition precedent to his right to recover.—*Markle v. The Niagara District Mutual Fire Insurance Company*, 525.

## INTERLOCUTORY JUDGMENT.

*In replevin, signed for want of a plea without an appearance by or for defendant, is a nullity.*—See REPLEVIN, 1.

## JOINT STOCK COMPANIES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

## JUDGE'S ORDER.

See REPLEVIN.

## JUDGMENT.

*Form of record of conviction and judgment in felony.*—See CRIMINAL LAW, 1.

*Verdict taken, and award made after the next term—Plaintiff may enter his judgment before the first four days of the term after award.*—See ARBITRATION AND AWARD.

## JURISDICTION.

See COUNTY COURT, 2.—DIVISION COURT.

## JURY.

*Challenges—Form of venire.*—See CRIMINAL LAW, 1, 2.

## JUSTICES OF THE PEACE.

*Qualification.*—Consol. Stat. C. ch. 100, sec. 3, prescribing the qualification of justices of the peace, does not require them to have a legal estate in the property; it is sufficient if the land, though mortgaged in fee, exceeds by \$1200 the amount of the mortgage money.—*Fraser qui tam v. McKenzie*, 255.

## LAND.

*Description of, in patent.*—See DESCRIPTION OF LAND.

## LIEN.

See PARTNERSHIP.

## LIMITATIONS (STATUTE OF).

1. *Promissory note payable in L. C.—Limitation of action*—12 Vic. ch. 22 sec. 31.]—A., residing in Upper

Canada, made a note there payable to B., also a resident of Upper Canada, at the Bank of British North America in Montreal, and B. endorsed it to the plaintiffs, who carried on business in Montreal. Neither A. nor B. had ever resided in Lower Canada.

12 Vic. ch. 22, sec. 31, enacts, that all notes payable in Lower Canada shall be held and taken to be absolutely paid and discharged, unless sued upon within five years after they become due.

*Held*, reversing the decision of the Queen's Bench, founded upon *Hervey v. Jacques*, 20 U. C. R. 366,—that the plaintiff in this case, suing here after a lapse of five years, was not barred, *Adam Wilson, J.*, dissenting.

*Draper, C. J.*, held that the statute, being applicable to Lower Canada only, did not change the limitation of actions on contracts made in Upper Canada by persons resident there; and that this note being payable in Montreal, without any limitation of not otherwise or elsewhere, was payable generally, and so not within the statute.

The rest of the court proceeded upon the latter ground only.—*Darling et al. v. Hitchcock*, 439.

2. *Real property—Disabilities.*—The plaintiff proved possession of nine acres of the land cleared by him since 1847. Defendant's father died in 1850, defendant being then only about four years old. *Held*, that the plaintiff as to this portion was clearly entitled by possession, for the statute having begun to run against defendant's father would continue as against defendant, notwithstanding her infancy.—*Wigle v. Stewart*, 427.

## LIQUORS.

*By-law to prohibit the sale of intoxicating liquors.*]—See TEMPERANCE ACT, 1864.

*On charge for selling without a license, it lies on defendant to prove his license.*]—See CERTIORARI.

## LIVERY OF SEIZIN.

*Not necessary to an assignment of dower.*]—See DOWER.

## MAGISTRATES.

See JUSTICES OF THE PEACE.

## MALICIOUSLY SUING OUT ATTACHMENT.

*Declaration—Pleading.*]—Declaration, that one O. caused an attachment to issue against the plaintiff as an absconding debtor, and that defendant, in order to enable him to obtain an order for such attachment, falsely, maliciously, and without reasonable or probable cause, made a false affidavit that he had good reason to believe, and did believe, that the plaintiff had departed from Upper Canada, with intent, &c. It was objected, in arrest of judgment, that there was no averment that the attachment had been set aside, nor that the defendant had no reasonable cause for making the affidavit, or for his belief; but

*Held*, that the first averment was unnecessary, and that the other was sufficiently made, after verdict. *Fahey v. Kennedy*, 301.

## MANDAMUS.

See QUARTER SESSIONS.

## MARRIED WOMEN.

1. *Conveyance by married woman*—*Certificate of examination*—1 W. IV. ch. 2.]—By 43 Geo. III. ch. 5, and 59 Geo. III. ch. 3, a married woman's deed was declared to have no force unless she were examined by the Court of K. B., or a Judge thereof, or a Judge of Assize, touching her consent, &c., within twelve months from the execution. By 1 W. IV., ch. 2, sec. 3, it was enacted, that where the deed would have been valid if such certificate had been obtained within twelve months as was required by the laws then in force, such certificate might be obtained at any time, and should have the same effect as if given within twelve months. This section took effect on the passing of the act in March, but another section, which enabled two justices of the peace, and other persons not mentioned in the former acts, to take such examinations, and made various changes in the form of certificate, did not come into force until the 1st of August following.

A deed was executed in 1822 by a married woman and her husband, but no certificate was endorsed until 1836, and the certificate then given was signed by two justices and sufficient in form under the earlier acts, though not under the 1 W. IV. There was no evidence of examination, &c., except the certificate :

*Held*, that the certificate was sufficient, for that the third section of 1 W. IV. might be construed to mean such certificate as would in its terms have been sufficient under the previous acts, without requiring it to be given by the officers then authorized.

The certificate given in 1836, stated that the married woman appeared before the justices and "acknowledged that she executed the within deed freely and voluntarily, and it appeared to us that her execution thereof was not the effect of fear or coercion," &c. : *Held*, sufficient, without stating the fact of examination.

*Held*, also, that her acknowledgment in 1836 was evidence of her consent at that time to the deed taking effect, and not merely of her free execution in 1822; and that other objections, based upon the requirements of the later act as to the form of the certificate, were not available.—*Grant and wife v. Taylor*, 234.

2. *Contract by*—C. S. U. C. ch. 73.]—*Held*, that a married woman having separate real property is not entitled by Consol. Stat. U. C. ch. 73, to contract debts for its improvement so as to make herself liable individually, *Adam Wilson, J.*, dissenting, or jointly with her husband.

The declaration alleged that the woman married before the 4th May, 1859, without a settlement, and having separate real estate, and after her marriage employed the plaintiff to repair a house on it, for which neither she nor her husband would pay.

*Held*, on demurrer, that the action would not lie.—*Wright v. Garden and Wife*, 609.

*Order for protection*.—*How far a defence in crim. con.*]—See CRIM. CON.

## MASTER AND SERVANT.

*Evidence of hiring.*]—See WORK AND LABOUR.

## MEASURE OF DAMAGES.

*See* BILLS OF LADING AND WAREHOUSE RECEIPTS, 1.—DAMAGES.—TROVER, 2.

## MEDICAL PRACTITIONERS.

*Evidence of negligence.*]—*See* NEGLIGENCE.

## MEMORANDA.

Calls to the Bar, 230, 438.

## MINING COMPANY.

*Right to draw bills or notes.*]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

## MISREPRESENTATION.

*See* SALE OF LANDS.

## MONEY HAD AND RECEIVED.

*Money had and received—Privity of contract.*]—Defendant being the treasurer of a turf club, by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was indebted to him for advances which he had previously made:

*Held*, that the plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club.—*Simms v. Denison*, 323.

## MORTGAGE.

*Absence of covenant to pay—Liability.*]—Where the mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage; there must be evidence given of a loan or debt.

A mere promise to pay such money in consideration of forbearance to sue would not be binding, though if in consideration of forbearing to sell or eject it would be:

*Held*, however, that in this case the evidence of such latter promise was unsatisfactory; and the jury having found for the plaintiff, a new trial was granted.—*Jackson and Wife v. Yeomans*, 307.

## MUNICIPAL CORPORATIONS.

*Town corporation—Obstruction of water-course—Liability.*]—The declaration charged that the defendants, the municipal corporation of a town, on the 1st of March, 1868, and on divers other days, penned back the water of a stream in the town, on which the plaintiff had a tannery, so that it flooded his land, &c. The obstruction complained of was a bridge along a street in the town, where there had been a bridge for about 30 years. One D., who owned land on the stream below the bridge, had a wheel in the stream, and parties above him cut away and sent down the ice in the spring, which formed a jam at D's, and filled the stream from thence up to and under the bridge. The weight of evidence tended to shew that but for this obstruction at D's, the plaintiff would not have been injured.



It was left to the jury to say whether the injury complained of was caused by the bridge, or by the ice-jam at D's, irrespective of the bridge, and they found for the plaintiff.

*Held* a misdirection: that they should have been told, if the damage was caused by persons sending ice down, which lodged against the bridge, and not by the ordinary action of the ice, defendants were not liable.

And *Semble*, that upon the declaration and evidence the plaintiff could not recover, for it was defendants' duty to build the bridge there, and no negligence was charged. — *Patterson v. The Corporation of the Town of Peterborough*, 505.

*Assessment of land belonging to.*] — See TAXES.

*By-law to prohibit the sale of intoxicating liquors.*] — See TEMPERANCE ACT, 1864.

## MURDER.

See CRIMINAL LAW, 1. 3.

## NEGLIGENCE.

*Evidence of—New trial.*]—In an action for negligence, where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury.

In an action against a surgeon for mal-practice in amputating an arm above, instead of below the elbow, several medical men of repute approved of the defendant's course. The jury having, nevertheless, found for the plaintiff, a new trial was granted without costs, *Jackson v. Hyde*, 294.

*In non repair of road.*]—See ROAD COMPANIES.

*Loss of luggage—Liability of Railway Co.*]—See RAILWAYS AND RAILWAY COS., 3.

See MUNICIPAL CORPORATIONS.

## NEW TRIAL.

*Granted, because case left to the jury on evidence as consistent with the absence as with the existence of negligence.*]—See NEGLIGENCE.

*On unsatisfactory evidence.*]—See MORTGAGE.

*For excessive damages.*]—See PARTNERSHIP.

*Quarter Sessions cannot grant, where a conviction has been affirmed jury on appeal.*]—See QUARTER by SESSIONS.

*For wrong ruling as to right to begin.*]—See RIGHT TO BEGIN.

## NORTHERN RAILWAY CO.

*Obligation of, as to fences.*]—See RAILWAYS AND RAILWAY COS.

## OFFICE.

See REGISTRAR.

## OFFICIAL ASSIGNEES.

See INSOLVENCY, 3.

## ONUS PROBANDI.

*On a charge of selling liquors without a license, defendant must shew his license; it is not for the informant to negative its existence.*]—See CERTIORARI.

## PARTNERSHIP.

*Partners—Lien—Award—Bill in Chancery.*]—The plaintiff having compiled a book, caused it to be

printed by a firm consisting of himself and defendant, on paper furnished by them; and defendant having refused to give up to him the copies thus printed, he brought trover. *Semble*, that he could not recover, for the property belonged to the firm, and defendant had as much right to retain as the plaintiff to take it.

There was evidence, however, of an agreement between them by which the copies had become the plaintiff's property; and as this view had not been fully submitted to the jury, and the damages given for the plaintiff were excessive, a new trial was granted.

An award having been made between the parties, the plaintiff afterwards filed a bill to dissolve and wind up the partnership as if no such award had been made, and swore that he was advised and believed the award was invalid.

*Held*, that this bill was not evidence against him to shew that he had so treated the award, but that he should not have used the award to support his case, and on this ground the new trial was granted without costs.—*Doupe v. Stewart*, 192.

### PATENT.

*Description of land in.*—See DESCRIPTION OF LAND.

### PAYMENT.

See SATISFACTION.

### PLEADING.

*Trespass to goods—Plea—Identity of goods.*—To a count in trespass, defendants avowed under a distress for rent, alleging that the plaintiff fraudulently removed certain of his

goods from the demised premises, whereupon defendant took the said goods in the second count mentioned.

*Held*, on demurrer, reversing the judgment of the County Court, that the plea was good, and not open to the objection that the goods taken were not shewn to be the goods fraudulently removed.

Remarks as to the refusal in the Court below to allow not guilty and a justification to be pleaded to the first count.—*Hatch v. Holland et al.*, 213.

*In replevin, a plea that plaintiff did not hold the land as tenant. &c., as in the avowry alleged, does not necessarily bring the title in question.*—See COUNTY COURTS, 2.

See BILLS OF LADING AND WAREHOUSE RECEIPTS, 2.—CRIM. CON.—INSURANCE, 1, 2.—MALICIOUSLY SUING OUT ATTACHMENT.—REPLEVIN, 2.—SALE OF LAND.—SATISFACTION.—TROVER.

### PRACTICE.

*Award on verdict taken, made after the next term—Plaintiff may enter judgment before the first four days of the term following the award.*—See ARBITRATION AND AWARD.

*On application for a certiorari to remove a conviction, the rule nisi may be entitled "In the matter of J. B.," and its being entitled in a court sufficiently shews that the conviction is to be removed into such court.*—See CERTIORARI.

*Proceedings in replevin as regards appearance are regulated by the Replevin Act, C S. U. C. ch. 29, not by the Common Law Procedure Act, and an interlocutory judgment signed for want of a plea, without any appear-*

*ance by or for defendant, is a nullity.]*  
See REPLEVIN.

*An objection that the title relied on in an action of ejectment is not the same as that mentioned in the notice, cannot be taken advantage of after trial.]—See TITLE.*

*Where defendant moves for nonsuit or new trial, and the rule is made absolute for new trial, he may appeal from the refusal of nonsuit without taking out rule absolute.]—See COUNTY COURTS, 2.*

## PRIVITY OF CONTRACT.

See MONEY HAD AND RECEIVED.

## PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

## QUARTER SESSIONS.

*Perverse verdict — New trial — Mandamus.]—Where a conviction has been affirmed by a jury on appeal to the quarter sessions, that court has no authority to grant a new trial.*

*Quære, whether, when such verdict has been rendered against the express direction of the chairman, that court would be bound, or should be compelled by mandamus, to enforce the conviction so affirmed. — Yearke, Appellant, and Bingleman, Respondent, 561.*

## RAILWAYS AND RAILWAY COMPANIES.

1. *Northern Railway Co.—Obligation to fence.—20 Vic. ch. 143]*—The plaintiff, by permission of one H., put his cattle into a pasture

field of H. adjoining defendants' railway, and the evidence went to shew that they escaped thence into an adjoining field occupied by one J., and thence on to the track, where they were killed by a train passing. The plaintiff sued, alleging that the horses escaped from the field where they were pasturing by reason of defects in the railway fences.

*Held*, affirming the judgment of the County Court, that he could not recover, for the horses were not in the field from which they escaped by the owner's permission.

The preamble to 20 Vic. ch. 143, which applies to this company the clauses of "The Railway Act" with respect to fences, has not the effect of extending their liability beyond that of other companies subject to the same provisions.—*Wilson v. The Northern Railway Company of Canada. 274.*

2. *R. W. Co.—Conveyance by of land required for their track—Effect of.]—The Grand Trunk R. W. Co. having acquired land 90 feet wide for the construction of their line, conveyed to the plaintiff a portion going 22 feet into the embankment, which at that point was high. The plaintiff built a root house on his portion, which fell in, and defendants filled up the hole, and repaired the embankment there, for which the plaintiff brought trespass. The jury found that what defendants did was necessary for the safety of their railway. Held*, that nevertheless they were liable; for having conveyed the land, as they had a right to do, they could not afterwards, without notice or compensation, interfere with their vendee.

*Quære, whether they could*

again acquire the land under the Statute.—*McDonald v. The Grand Trunk Railway Company of Canada*, 320.

3. The plaintiff was a passenger on defendants' railway from Paris to Seaforth, with two trunks, for which he had checks. At Seaforth the trunks were put on the platform, and he assisted defendants' servant to carry them into the baggage room, and went up in an omnibus to the hotel; this was about 3, p.m. In the evening, about 8, he sent his checks for the trunks, but one of them had disappeared, and the evidence went to shew that it had been stolen. *Held*, that defendants were not responsible: that their duty as common carriers ended when the trunk had been placed on the platform and the plaintiff had had a reasonable time to remove it, as he clearly had here. A nonsuit was therefore ordered.—*Penton v. Grand Trunk Railway Company of Canada*, 367.

### RECITAL.

*In chattel mortgage to secure against indorsement.*—See CHATTEL MORTGAGE.

### RECORD.

*Of conviction for murder.*—See CRIMINAL LAW, 1.

### REGISTRAR.

*Tenure of office*—9 Vic. ch. 34, 29 Vic. ch. 24.]—Plaintiff in 1859 was appointed registrar, under 9 Vic. ch. 34, which authorized the Governor in general terms to appoint, saying nothing as to tenure,

but providing for removal in certain events, to be proved in a specified manner. His commission expressed the appointment to be during pleasure, and in 1864 he was removed and defendant appointed, the admitted cause of such removal being plaintiff's alleged misconduct as returning officer at an election.

The court of Queen's Bench held that the plaintiff could be removed only for the reasons and in the manner pointed out by the statute; that the words "during pleasure" in his commission could not deprive him of his statutory rights; and that the 29 V. ch. 24, by which every registrar then in office was continued therein, would not confirm defendant's appointment if illegal.

*Held*, reversing such judgment, *Draper, C. J.*, and *Morrison, J.*, dissenting,—1. That the office being one to which at common law the appointment might be during pleasure, and the statute not providing expressly for the tenure, the plaintiff's appointment during pleasure and his removal was valid. 2. That if the office was one of freehold, then the grant of it during pleasure was void, and the plaintiff was never appointed.

*Adam Wilson, J.*, concurred with the court below in holding, under 9 Vic. ch. 34, that the plaintiff's appointment was valid and his removal ineffectual; but held, that by 29 Vic. ch. 24, the defendant, then filling the office *de facto*, was confirmed in his appointment.—*Hammond v. McLay (In Appeal)*, 463.

### REPAIRS.

*Of highway—Obstruction by snow.*—See ROAD COS.



## REPLEVIN.

1. *Practice—Appearance—Service out of the jurisdiction.*]—The proceedings in replevin as regards appearance are regulated by the Replevin Act, C. S. U. C. ch. 29, not by the C. L. P. A.; and an interlocutory judgment signed as for want of a plea, without any appearance by or for defendant, is therefore a nullity.

The plaintiff having served a writ of replevin on defendant, at his residence in the United States, and replevied the goods here, obtained a judge's order to proceed, as if the case were within the general provisions of the C. L. P. A.; and having served the declaration, &c., in accordance with such order, signed interlocutory judgment as for want of a plea, without any appearance, and assessed damages at the assizes. *Held*, that the order was unauthorized; and all the proceedings were set aside.—*Hart v. Pacaud*, 390.

2. *Action on replevin bond—Neglecting to prosecute with effect.*]—To a breach of a replevin bond in not prosecuting the suit, which was in a county court, with effect, defendants pleaded that the suit was brought to trial without delay, and a verdict given for defendants, with leave reserved to move for a non-suit or verdict for plaintiff; that in the next term a rule *nisi* was obtained accordingly, on the argument of which defendants therein objected to the judge proceeding further, because title to land had come in question, whereupon the judge determined that the jurisdiction of his court was ousted, and he declined giving judgment, and none had ever been given; and that the plaintiff in the cause then

applied in chambers at Toronto for a *certiorari*, which was refused.

*Held*, that the plea shewed no defence; for that the suit had been brought to an unsuccessful termination, and the facts of the defendants in it having caused such result by objecting to the jurisdiction could not prevent their recovery on the bond.—*Welsh et al v. O'Brien et al.*, 405.

3. *Goods in possession of third person.*]—To an action of trespass for taking goods, defendant justified, as sheriff, under a writ of replevin at the suit of one H. against P., alleging that he entered plaintiffs' freight house, where the goods were, the outer door being open, and replevied the goods to H., the same then being in the plaintiffs' possession as bailees and agents only of P., who unjustly detained them from H.

*Held*, no defence; for the plea did not bring defendant within secs. 9 & 10 of the Replevin Act; and in replevin against one person goods cannot be taken out of the peaceable possession of another without notice or demand.—*The Great Western Railway Company v. McEwan*, 528.

*Full costs not taxable in replevin without a certificate.*]—See COSTS.

*Avowry as for distress damage feasant.*]—See DISTRESS.

## RIGHT TO BEGIN.

*Appeal — Costs.*]—Replevin for a horse—Plea, that the horse was the horse of the defendant and not of the plaintiff as alleged, and issue thereon: *Held*, that the plaintiff was entitled to begin.

The judge of the county court

granted a new trial on the ground that he was wrong in allowing the plaintiff to begin, and that it had prejudiced the defendant, as the verdict for the plaintiff was against the weight of evidence. This court held that though the verdict was wrong on the evidence the ruling was right, and an appeal was therefore dismissed *without costs*.—*Neville v. Fox*, 231.

### ROAD COMPANIES.

*Snow drifts—Action for not repairing.*—A snow drift, about two or three rods in length, and two feet in depth, had formed on a gravel road. It had been there two or three weeks, and owing to the thawing and freezing of the snow, ruts had formed in it, which made it unsafe for waggons. On the 1st of March the plaintiff was passing over it in a waggon, when the wheel going down threw him out, and the hind wheel went over his leg and broke it. The defendants afterwards cleared away the snow there. The road was good except for the snow, and there was a heavy snow storm and sleighing after the accident.

*Held*, that there was evidence of negligence on the part of the defendants in not keeping the road in repair, and a verdict for the plaintiff was upheld.—*Caswell v. The St. Mary's and Proof Line Junction Road Company*, 247.

See TOLLS.

### SALE OF GOODS.

*Agreement to supply timber—Construction—When property vests.*—

M., by agreement with the defendants, agreed to manufacture for and supply to them certain timber, which he was to mark with defendants' name and deliver at one or two places on Sturgeon lake, to boom it securely, and complete the delivery by a day named. Defendants were to pay two-thirds of the contract price as the work proceeded, and the rest on completion of the contract. No rough, coarse or cull timber was to be accepted, and the timber was to be measured by defendants when delivered, or from time to time, M. to have it measured by a culler if not satisfied with defendants' measurement, and the expenses thereof to be borne equally.

The timber was made by M. from his own trees, marked by him with defendants' name as made, and hauled to the lake and boomed there; but it had not been measured or accepted by defendants nor delivered to them, nor dealt with by them as their own. They had made advances from time to time, but there was a disputed balance claimed by M.

M., under these circumstances, put the men he had employed in manufacturing the timber in possession of it, as security for their wages. Defendants took it out of the possession of the plaintiff, one of the men, and the plaintiff brought trespass:

*Held*, that the property in the timber had not passed to the defendants, and that the plaintiff therefore could recover.

But *Seemle*, that in equity defendants would have a prior claim upon it to the extent of their advances.—*Robertson v. Strickland et al.*, 221.

SALE OF LAND.

*Misrepresentation—Equitable plea.*]  
—To a declaration on a covenant to pay \$500, defendant pleaded, on equitable grounds, that the plaintiff agreed to sell to the defendant certain land, which the plaintiff represented that he had purchased from Government, and was entitled to obtain a patent for on payment of \$500: that defendant thereupon covenanted to pay the plaintiff the \$500, and plaintiff covenanted that on receiving it he would cause a patent to be issued in defendant's name: that defendant had always been ready to pay; but that the plaintiff had not purchased from the Government and had no right to the land, nor could he procure a patent; and if defendant paid him the \$500, he would receive no consideration, and would be unable to recover it back.

*Held*, a bad plea, for the agreement was not alleged to be the same as that sued on; no fraud was averred; no definite misrepresentation which induced defendant's contract; no breach of contract on the plaintiff's part was stated; and no ground for an injunction shewn.—*Cameron v. Borrowman*, 262.

SATISFACTION.

*Sci. Fa.* — *Equitable defence—Conveyance taken in satisfaction.*]

*Sci. Fa.* upon a judgment for \$2000, against defendant as administrator of M., on a bond in that sum, conditioned for the payment of \$1200 by instalments, with a suggestion that two instalments were due and unpaid.

Plea, on equitable grounds, that before the *sci. fa.* issued it was agreed between the plaintiff and

the defendant, with several others, the heirs-at-law of M., that they should convey to the plaintiff their interest in certain land, of which as such heirs they were seised in fee: that the consideration therefor should be \$2000, and their interest should be treated as so much in cash, which sum should be applied as a payment by the estate of M. to the plaintiff: that the defendant and the others accordingly conveyed their interest in the land to the plaintiff, and the plaintiff accepted such conveyance as representing \$2000, and credited the estate of M. with that sum: that the only debt then due by the estate to the plaintiff was the said judgment, on which the total amount then due and accruing due was less than \$2000, whereby said judgment was satisfied; and such credit was the only consideration for the conveyance. *Held*, on demurrer, that the plea shewed a good defence.—*Whiteford v. McLeod*, administrator, 349.

SEVERAL PLEAS.

*See* PLEADING.

SCIRE FACIAS.

*See* SATISFACTION.

SHIPPING.

*See* BILLS OF LADING AND WAREHOUSE RECEIPTS, [—TROVER, 2.

SNOW.

*Obstruction of highway by—Liability of Road Company.*]

—*See* ROAD COMPANIES.

STAMPS.

27-28 Vic. ch. 4—*Construction—Penalty.*]

—The Stamp Act does not

require an instrument to be stamped which with stamps would not be valid for some purposes; or, *semble*, which would not be a promissory note, draft, or bill of exchange.

No penalty therefore can be recovered, under 27-28 Vic. ch. 4, sec. 9, for not affixing stamps to a promissory note for money lost at play, for such note, under the statute of Anne, is utterly void.—*Taylor v. Golding*, 198.

### TESTE.

*Of writ of assignment of dower.*]  
—See DOWER.

### STATUTES.

13 Eliz. ch. 5.]—See FRAUDULENT CONVEYANCE.

43 Geo. 3, ch. 5.]—See MARRIED WOMEN.

59 Geo. 3, ch. 3.]—See MARRIED WOMEN.

1 Wm. 4, ch. 2, sec. 3.]—See MARRIED WOMEN.

9 Vic. ch. 34.]—See REGISTRAR.

12 Vic. ch. 22, sec. 31.]—See LIMITATIONS, STATUTE OF.

20 Vic. ch. 61.]—See CRIMINAL LAW, 2.

20 Vic. ch. 143.]—See RAILWAYS AND RAILWAY COS., 1.

Con. Stat. C. ch. 54.]—See BILLS OF LADING, &C., 2.

Con. Stat. C. ch. 63, s. 57.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

Con. Stat. C. ch. 99, sec. 52.]—See CRIMINAL LAW, 1.

Con. Stat. C. ch. 100, sec. 3.]—See JUSTICES OF THE PEACE.

Con. Stat. U. C. ch. 11.]—See CRIMINAL LAW, 1.

Con. Stat. U. C. ch. 13, sec. 29.]—See CRIMINAL LAW, 2.

Con. Stat. U. C. ch. 29, secs. 9 & 10.]—See REPLEVIN, 3.

Con. Stat. U. C. ch. 31.]—See CRIMINAL LAW, 1.

C. L. P. Act, sec. 49.]—See DOWER.

Con. Stat. U. C. ch. 45, sec. 5.]—See CHATTEL MORTGAGE.

Con. Stat. U. C. ch. 49, sec. 89.]—See TOLLS.

Con. Stat. U. C. ch. 73.]—See MARRIED WOMEN, 2.

Con. Stat. U. C. ch. 113.]—See CRIMINAL LAW, 2.

27-28 Vic. ch. 4.]—See STAMPS.

27-28 Vic. ch. 17, sec. 4, sub-sec. 2.]—See INSOLVENCY, 3.

27-28 Vic. ch. 17, sec. 8, sub-sec. 4.]—See INSOLVENCY, 1, 2.

27-28 Vic. ch. 17, sec. 8, sub-secs. 1, 4, 5.]—See INSOLVENCY, 3.

27-28 Vic. ch. 18.]—See TEMPERANCE ACT 1864.

29 Vic. ch. 24.]—See REGISTRAR.

29-30 Vic. ch. 40.]—See CRIMINAL LAW, 1.

31 Vic. ch. 11.]—See BILLS OF LADING, 1.

### STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

### SURGEON.

*Action for malpractice.*] — See NEGLIGENCE.

### SURPLUSAGE.

*In pleading.*]—See INSURANCE, 1, 2.

### TAXES.

*Property belonging to Municipal Corporation.*]—*Held*, affirming the judgment of the Queen's Bench, that land owned by a city, but leased by them to a tenant for his own private purposes, was liable to taxation, and that the corporation might distrain for such taxes.

*Morrison, J.*, dissented, on the ground that the land was not liable; *Van Koughnet, C.*, and *Spragge, V. C.*, on the ground that, though the corporation might sue on the covenant to pay, they could not distrain.—*Scragg v. The Corporation of the City of London*, 457.

### TEMPERANCE ACT OF 1864.

*By-law*—*Publication*.—A by-law



to repeal a By-law prohibiting the sale of intoxicating liquors, under the Temperance Act of 1864, was first published on the 2nd of October, 1868, with a notice for a meeting of the electors on the 4th of November, at two, p.m. On the 9th, 16th, and 23rd, it was again published, with a notice for the meeting at 10, a.m., on the 4th, when the poll was held.

*Held*, that the first notice was bad, for the statute requires the meeting to be at 10, a.m., and the meeting in consequence was not held within the week next after the fourth week of publication, as directed by the act. The by-law was therefore quashed.

The clerk was not present at the meeting, and the reeve acted both as presiding officer and poll clerk, certifying the proceedings in both capacities. *Quere*, whether the by-law would have been bad on this ground.

*Held*, that the by-law, upon the facts stated below, was sufficiently certified under the seal of the corporation.—*In Re Miles and the Corporation of the Township of Richmond*, 333.

### TIMBER.

*Agreement to supply—When property vests—Lien for advances.*—*See* SALE OF GOODS.

### TITLE.

*Proof of title—Offers to purchase—Estoppel.*—A plaintiff in ejectment proved that he had leased the land to one B., and that after he had left possession defendant went in: that defendant offered to purchase at the valuation of a person named, and after the commencement of

this action offered \$800 for the place: *Held*, sufficient evidence to go to the jury, without further proof of plaintiff's title.

An objection that the title relied on is not the same as that mentioned in the notice cannot be taken advantage of after the trial,—*Pennington v. Brownlee*, 189.

### TOLLS.

*Illegal demand of—Conviction for—Exemption.*—Consol. Stat. U.C. ch. 49, sec. 89, which makes it an offence to "take a greater toll than is authorized by law," does not apply to the case of taking toll from a person who is altogether exempt.

If it did, a conviction for such offence should state the ground of exemption, and the fact of such exemption being claimed.

In this case the defendant passed through the gate on the 10th January, the collector giving him credit, as was usual between them. On the 20th they had a settlement, and this toll was then demanded and paid. *Semble*, that a conviction for such demand, if illegal, could not be supported,—*The Queen v. Campeon*, 259.

### TRESPASS.

*Construction of count—Trover or Trespass.*—*See* TROVER.

*See* PLEADING.

### TROVER.

1. *Construction of count—Trover or Trespass.*—*Semble*, That a count charging that the defendants took and converted to their own use, and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, might be treated as in

trover, not trespass; and a justification therefore might be proved under not guilty.—*Hatch v. Holland et al.*, 213.

2. *Contract to forward goods by a specified route—Deviation—Loss of goods by fire—Liability—Trover—Measure of Damages.*—The plaintiffs, living at Southampton, having purchased goods at Montreal, directed them to be forwarded to Kingston, to the care of the schooner "Regina." They were so sent in one of the mail steamers, but the captain of the "Regina" being unable to wait at Kingston, directed defendants, who were forwarders there, to send them on by the same steamer to Hamilton, and thence by the railway to Sarnia, where he would take them up on his way to Southampton. Defendants however shipped them from Kingston by a propeller, which was burned, with the goods on board, in the River St. Clair. They had been insured to go by the "Regina," but having been shipped on a different vessel the policy was cancelled.

*Held, Richards, C. J.*, dissenting, that the defendants were not liable in trover, the delivery to the propeller instead of the mail steamer not being a conversion; and that on a special count on the contract, for not sending as directed, only nominal damages could be recovered, the loss by fire being too remote.

Per *Richards, C. J.*, defendants were liable in trover; and *Quære*, whether on the special count the full value of the goods could not be recovered.—*Wallace et al. v. Swift et al.*, 563,

3. *By one partner against another.*—See PARTNERSHIP.

## TURF CLUB.

*Money received by Treasurer—Right of action by winner of purses.*—See MONEY HAD AND RECEIVED.

## VENIRE.

*Form of, in record of conviction for felony.*—See CRIMINAL LAW, 1.

## VOLUNTARY ASSIGNMENT.

See INSOLVENCY, 3.

## WAGES.

See WORK AND LABOUR.

## WAIVER.

*Of irregularity in assignment of dower.*—See DOWER.

*Of condition in policy.*—See INSURANCE, 1.

## WAREHOUSE RECEIPTS.

See BILLS OF LADING AND WAREHOUSE RECEIPTS.

## WATERCOURSE.

*Obstruction of, by municipality—Liability.*—See MUNICIPAL CORPORATIONS.

## WILLS.

*Devisee an attesting witness—Power of sale—Construction of.*—Where a devisee witnesses the will the devise to him is void, although there are two other witnesses, and the will would therefore have been sufficiently attested without him.

*Held*, (the court being left to draw inferences of fact), that upon the evidence set out below it must be inferred that the devisee, whose

name was subscribed as a witness, did see the testator sign, although he swore that he thought he did not, and that he subscribed in his presence.

Testator devised the land in question to his wife for life, remainder to his nephew T., in fee. He then devised specific land to be disposed of by his executors for the payment of his debts, and added "and I also do hereby acknowledge and authorize them to sell, grant and convey in full and proper manner, any, all, or such of my real estate as may be necessary to the payment and liquidation of any and all such just debts as may be due by me, and not otherwise provided for:"

*Held*, that under this clause the executors had power to sell the land in question.

They conveyed to one P., a creditor, who was to pay the widow a certain sum for her dower, and the residue to other creditors:

*Held*, that the legal estate passed, whether the sale could be impeached in equity or not.

Executors in such a case are not bound to sign the deed in presence of each other, as arbitrators execut-

ing an award.—*Little v. Aikman et al.*, 337.

## WITNESS.

See CRIMINAL LAW, 3.

## WORK AND LABOUR.

*Agreement to hire—Evidence of.*]

—In an action for wages of the plaintiff's son as defendant's servant, it was proved that defendant had said he would give the son what was going; that the son went to him at twelve years of age, and worked for him four years, and that on his leaving defendant told him to send his father and he would settle with him.

*Held*, affirming the judgment of the county court, that this was clearly evidence to go the jury of an agreement between plaintiff and defendant.—*Pickering v. Ellis*, 187.

## WRIT OF ASSIGNMENT OF DOWER.

*May be tested when issued.*].—See DOWER.

## WRIT OF ERROR.

*Form of.*].—See CRIMINAL LAW, 2.

















